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IN THE  
**SUPREME COURT**  
 OF THE  
**UNITED STATES**  
 OCTOBER TERM, 1976  
 No. ....

76-930

DANIEL J. EVANS, Governor of the State of Washington;  
 SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; DAVID S. McEACHRAN, Whatcom County Prosecuting Attorney; CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney; COALITION AGAINST OIL POLLUTION; NATIONAL WILDLIFE FEDERATION; SIERRA CLUB; and ENVIRONMENTAL DEFENSE FUND, INC.,

Appellants,

v.

ATLANTIC RICHFIELD COMPANY, and SEATRAIN LINES, INC.,

Appellees.

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DANIEL J. EVANS, Governor of the State of  
Washington, *et al.*,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, *et al.*,

*Appellees.*

**On Appeal From The United States District Court  
For The Western District Of Washington**

**JURISDICTIONAL STATEMENT**

Appellants, Daniel J. Evans, Governor of the State of Washington, *et al.*, appeal to this Court from an order of the United States District Court for the Western District of Washington, sitting as a statutory three-judge court, enjoining enforcement of Chapter 125 of the Laws of the State of Washington, 1975, First Extraordinary Session, codified at R.C.W. §§ 88.16.170 *et seq.* ("Chapter 125"). The order appealed from was issued in execution of a judgment of the District Court declaring Chapter 125 void and of no force and effect. Pursuant to Rule 15

of the Rules of the Supreme Court, Appellants submit this Jurisdictional Statement to show that this Court has jurisdiction of the appeal, that substantial federal questions are presented herein, and that Appellants are entitled to plenary review of the judgment below.

#### OPINIONS BELOW

The orders appealed from, and the District Court's opinion on the merits of the case, have not yet been reported. The District Court's orders are set forth in the Appendix at Appendix A and Appendix B, respectively.<sup>1</sup> The opinion of the District Court on the merits of the case, together with the judgment, are set forth in App. C and App. D, respectively.

#### JURISDICTION

This is a direct appeal pursuant to 28 U.S.C. § 1253 from an order granting, after notice and hearing, a permanent injunction in a civil action required by 28 U.S.C. §§ 2281, 2284, to be heard and determined by a three-judge District Court.<sup>2</sup> The Complaint in this action sought to have Chapter 125 declared unconstitutional and void and to have its enforcement enjoined. The District Court's judgment invalidating the statute was entered on September 24, 1976. The District Court's order enjoin-

<sup>1</sup>Citations to the Appendix are in the form "App. ....".

<sup>2</sup>Subsequent to the filing of the Complaint in this action, the Three-Judge Court Act was substantially modified by Pub. L. No. 94-381 (August 12, 1976). However, by its own terms, that modification is not retroactive, and thus does not affect cases such as the present one.

ing its enforcement was issued November 12, 1976. Appellants filed Notices of Appeal to this Court on November 19, 1976 (App. E).<sup>3</sup> Because the District Court, acting as a statutory three-judge court, invalidated the statute and enjoined its enforcement, this Court has jurisdiction on direct appeal under 28 U.S.C. § 1253. See, e.g., *Moe v. Confederated Salish & Kootenai Tribes, Etc.*, 421 U.S. 707 (1976); *Philbrook v. Glodgett*, 421 U.S. \_\_\_\_\_, 95 S. Ct. 1893 (1975); *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973); see also *Carlsson v. Remillard*, 406 U.S. 598 (1972); *Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423 (1966); *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The primary constitutional and statutory provisions involved in this case are the Supremacy and Commerce Clauses of the United States Constitution (Article VI, Clause 2; Art. I, Section 8, Clause 3); Chapter 125; and the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424, 33 U.S.C. §§ 1221 *et seq.*, 46 U.S.C. § 391a (the "PWSA"). They are set forth in the Appendix at

<sup>3</sup>Appellants have also filed notices of appeal, as a precautionary measure, to the Court of Appeals for the Ninth Circuit. See App. F. The District Court, by order of December 1, 1976, at the motion of the State defendants, Daniel J. Evans et al., suspended all processing of these appeals pending completion of the appeal to which this jurisdictional statement relates. See App. M and App. N, respectively.

App. H, App. I, and App. J, respectively.

Other provisions of the United States Constitution involved are the Treaty Making Clause (Article II, Section 2, Clause 2) and Amendment XI to the United States Constitution. They are set forth at App. K. and App. L., respectively.

#### QUESTIONS PRESENTED

In 1975 the State of Washington enacted legislation, Chapter 125, designed to protect certain highly valued navigable waters and adjacent shorelines of the State from damage by oil carried by large oil tankers. The appeal presents the following questions:

1. Whether the historic police powers of a state to protect its citizens and navigable water resources from oil pollution, by ensuring safe methods of oil transportation by tankers, have been wholly ousted by the Ports and Waterways Safety Act of 1972 — a federal statute which does not express an explicit intent to do so and which creates a scheme compatible with continuing state regulation?
2. Whether the historic state police powers as exercised in Chapter 125 impermissibly conflict with:
  - a. The Commerce Clause, or
  - b. The Treaty Making Clause?

A further question is:

Whether in light of the Eleventh Amendment the district court had jurisdictions over the State

of Washington defendants Governor Daniel J. Evans, et al?

#### STATEMENT OF THE CASE

##### A. The Statutory Scheme

This case involves a challenge to the constitutional validity of Chapter 125 brought by Atlantic Richfield Company ("ARCO"),<sup>4</sup> which owns and operates an oil refinery and related facilities at Cherry Point, Washington, adjoining northern Puget Sound.<sup>5</sup> Chapter 125 is an act designed " \* \* \* to decrease the likelihood of oil spills on Puget Sound and its shorelines", through regulation of certain aspects of oil tanker operation within the Sound.

Puget Sound,<sup>6</sup> a large arm of the Pacific Ocean which flows—on tidal cyclic basis—deep into Western Washington, is a resource of priceless value to the people of the State of Washington. It functions as the center for numerous commercial, recreational, educational, and scientific activities, all of which depend

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<sup>4</sup>Seatrail Lines, Inc., a shipbuilding and ship-operating company, subsequently intervened in the suit as a plaintiff.

<sup>5</sup>ARCO's challenge relies in large measure upon the Ports and Waterways Safety Act of 1972. That act authorizes the Coast Guard to establish vessel traffic systems in selected ports and waterways (Title I) and to improve minimum standards for the design, construction and operation of oil tankers (Title II).

<sup>6</sup>"Puget Sound," as described for purposes of Chapter 125, is that area including the marine waters within the State of Washington lying east of a line drawn from Discovery Island Light (on the southern tip of Vancouver Island, British Columbia) to the New Dungeness Light (approximately halfway between Port Townsend and Port Angeles, Washington). More than 60% of the residents of the State reside in the twelve counties which border Puget Sound.

to a greater or lesser extent, on a pollution-free Puget Sound.

Chapter 125 was enacted to ensure the safe transport of oil to the several refineries operating adjacent to Puget Sound. To reach the four larger refineries within the Puget Sound area, tankers must pass from the Pacific Ocean through the Straits of Juan de Fuca, then up narrow and hazardous channels skirting the San Juan Islands, an area renowned for its beauty as well as for its scientific and recreational importance. Protection of these resources from the dangers of oil spills has assumed increased importance because the opening of the Trans-Alaska Pipeline will result in substantially increased tanker traffic in Puget Sound.<sup>7</sup>

Chapter 125 is intended to accomplish its goal of protecting Puget Sound from pollution by oil by essentially three means. First, based upon a legislative determination that the risk from a massive oil spill from "supertankers" (any oil tanker larger than 125,000 deadweight tons ["DWT"]) in the confined waters of Puget Sound is unacceptable, Chapter 125 prohibits their entry into the Sound (Section 3[1]). Second, oil tankers larger than 40,000 DWT but smaller than 125,000 DWT are permitted to

<sup>7</sup>Approximately 15% of the Alaskan crude oil is intended for Puget Sound. In 1974, imports by tanker to Puget Sound averaged 129,000 barrels per day. In 1977, the opening year of the Trans-Alaska Pipeline, 122,000 barrels per day of North Slope oil are scheduled for delivery to Puget Sound refineries; by 1978, that amount will increase to 213,000 barrels per day; and by 1981, it will reach more than 336,000 barrels per day. These, of course, are estimates, and may be low.

enter the Sound if they are either accompanied by a tug escort or possess certain prescribed safety features (Section 3[2]).<sup>8</sup> Third, all oil tankers above 50,000 DWT are required to have state licensed pilots on board when navigating the Sound (Section 2). (Chapter 125 does not apply to tankers smaller than 40,000 DWT). At the time Chapter 125 was passed, and continuing to this date, there have been no federal regulations in effect establishing for Puget Sound the kind of operational safety precautions reflected in Chapter 125, e.g., general access limits and tug escort requirements. The design features specified as an alternative to tug escorts in Chapter 125 are fully compatible with all federal design and construction standards.

The scheme of protection against oil spill risks contemplated by Chapter 125 is an integral part of the overall effort of the State of Washington to preserve and enhance the environmental quality of Puget Sound. Over the past ten years, the State has enacted extensive legislation to protect the Sound,<sup>9</sup> and the federal, state and local governments have expended

<sup>8</sup>The prescribed safety features are minimum shaft horsepower of at least one horsepower for each 2.5 DWT; twin screws; double bottoms underneath all oil and liquid cargo spaces; two radars, one of which must be collision avoidance radar; and such other navigational systems as may be prescribed by the Board of Pilotage Commissioners.

<sup>9</sup>This legislation includes the Shoreline Management Act of 1971, Chapter 90.58 RCW; Water Resources Act of 1971, Chapter 90.54 RCW; State Water Pollution Control Act, Chapter 90.48 RCW; and Coastal Waters Protection Act of 1971, RCW §§ 90.48.370 et seq.

hundreds of millions of dollars to enhance the Sound's water quality. Further, for several years, the State has actively pursued a policy aimed at limiting tanker traffic in the Sound, particularly by encouraging development of a single oil transfer terminal for supertankers in the state but outside Puget Sound. The State's Coastal Zone Management Program, approved by the Secretary of Commerce on June 1, 1976, pursuant to the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*, makes the concept of a single oil transfer terminal, located outside Puget Sound and capable of supplying all existing refineries, a central element of the State's oil transportation policy.

#### B. Proceedings Below

Chapter 125 became effective on September 8, 1975. The same day, ARCO filed a Complaint in the United States District Court for the Western District of Washington seeking a judgment to declare the statute unconstitutional and void and to enjoin its enforcement. Named as defendants were the Appellants here, the state officials responsible for enforcement of Chapter 125, including Daniel J. Evans, Governor of the State of Washington, Slade Gorton, Attorney General of the State of Washington, the five members of the Board of Pilotage Commissioners of Washington and David S. McEachran, Prosecuting Attorney of Whatcom County, the county in

which the ARCO refinery is located.<sup>10</sup> ARCO's primary claims were that Chapter 125 was invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2), because it had been preempted by federal law, particularly the PWSA, and that Chapter 125 imposed an undue burden on interstate commerce, in violation of the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).<sup>11</sup> Because the action sought injunctive relief against enforcement of a state statute on the grounds of unconstitutionality, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284, to determine the case. Although ARCO in its Complaint requested a temporary injunction, it did not pursue that request and no preliminary relief was issued by the District Court. ARCO continued to comply with Chapter 125 during the pendency of the litigation in the District Court.

The District Court heard the case on June 25, 1976, upon an agreed statement of facts.<sup>12</sup> On September 23, 1976, the District Court rendered its decision. In a six-page opinion, it held that Chapter 125 was preempted in its entirety by federal law, in

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<sup>10</sup>Subsequent to filing of the Complaint, the King County Prosecutor (Christopher T. Bayley), and four organizations concerned with preservation of Puget Sound (the Coalition Against Oil Pollution, the National Wildlife Federation, the Sierra Club and the Environmental Defense Fund), also Appellants here, intervened in the suit as defendants.

<sup>11</sup>ARCO also claimed Chapter 125 was invalid based upon federal foreign affairs and treaty-making powers.

<sup>12</sup>The agreed statement of facts was embodied in a Pre-Trial Order, dated April 6, 1976; it is hereinafter cited by paragraph or exhibit references in parentheses.

particular the PWSA. A judgment declaring the ~~fed-~~  
~~eral~~ statute invalid was entered on September 24, 1976.

On November 12, 1976, upon the motion of ARCO, the District Court issued a further order permanently enjoining the Appellants from enforcing or attempting to enforce Chapter 125. The Appellants requested a stay of that order pending completion of an appeal. The District Court stayed the effectiveness of the injunction until December 15, 1976. The Appellants, by application filed with this Court on December 6, 1976, sought a further stay of the mandate of the District Court. On December 9, 1976, Mr. Justice Rehnquist referred the application for a stay to the full Court at the conference following December 10, 1976, and continued the stay of the District Court's mandate pending further order. To date, the full Court has not yet ruled upon the application for a stay.

#### THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented to this Court by this appeal are both substantial and important. The District Court held that this statute preempted the entire field of oil tanker regulation. The sweeping pre-emption holding of the District Court radically upsets an area of traditional state competence, ousting coastal states from their historically recognized police powers over coastal and harbor uses to prevent pol-

lution.<sup>13</sup> The District Court's holding can be justified neither by the language and history of the PWSA nor by the nature of the regulatory scheme it establishes. Finally, the District Court's holding runs counter to the overall federal policy of encouraging state action to protect valuable state marine and coastal resources.

#### I. Regulation of Port and Waterway Safety is a Fundamental Attribute of the State's Police Powers

The authority to protect the environment and the health and safety of the public by regulating the safety of state navigable waters has long been recognized to be a fundamental attribute of the states' police powers. This Court, more than a century ago, in *Cooley v. Board of Wardens*, 53 U.S. 298 (1851), emphasized that the different needs and peculiar, unique features of different port areas demand particularized local regulation. An unbroken line of cases since, from *Packet Co. v. Cattlettsburg*, 105 U.S. 559 (1881) (landing regulations), to *Morgan's L. & T.R. & S.S. Co. v. Board of Health*, 118 U.S. 455 (1886) (quarantine regulations), to *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (smoke abatement ordinance), to, most recently, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (oil spill liability scheme), reflects the same understanding. In *Askew*, the Court rejected pre-emption claims in the field of oil spill liability, term-

<sup>13</sup>Significantly, six concerned States filed *amicus curiae* briefs in the District Court supporting the State of Washington's position.

ing oil spills "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." 411 U.S. at 328.

The District Court's holding in this case, ignoring the strong presumption in favor of upholding state exercise of police power, strips the states of all authority to regulate vessel source pollution.<sup>14</sup>

## **II. The Ports and Waterways Safety Act Does Not Express a Clear and Manifest Purpose to Preempt State Regulation**

In order to preempt the "historic police power of the states" to protect the environment and the health and safety of their citizens, Congress must express a "clear and manifest purpose" to do so. See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Since preemption involves "the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties \* \* \* the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding

<sup>14</sup>Statutes of various states provide for equipment or operation requirements and also for exclusion of vessels from particular state waters. See, e.g., Connecticut General Statutes Ann. §25-54 cc; New Hampshire Revised Statutes Ann. Vol. 2, §145-a:11; Maine Revised Statutes Ann. §560(3). The State of Alaska has also recently enacted legislation designed to reduce the risks to Alaska associated with the marine transport leg of the Trans-Alaska Pipeline, Chapter 266, Laws of Alaska 1976, Chapter 20 §§30.20.010 et seq., Alaska Statutes.

one completely ousted.' " *Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

The District Court, making no effort to reconcile the state and federal enactments, relied on no express language in either the PWSA or its legislative history which would demonstrate a congressional intent to preempt. Significantly, Senator Warren Magnuson, the Senate sponsor of the PWSA, has disagreed with the District Court's analysis; he has stated:

"As the sponsor of that Act [the PWSA] in the Senate, I have made known my disagreement with the decision. I think it is wrong; I feel the Court has simply misread the intent of Congress as contained in the Ports and Waterways Safety Act. The weakness of the decision is highlighted by the complete absence of any analysis of the terms of the Act. The Court's reasoning was simplistic at best. Preemption is not favored in the law. Congress must show a clear intent to preempt before such a finding is made. This court summarily reached its decision on the thinness of reasoning. I say they are wrong." 121 Cong. Rec. S.17575 (daily ed., October 1, 1976).

No clear and manifest intent to occupy the entire field of oil tanker regulation can be found in the PWSA.<sup>15</sup> Contrary to the District Court's character-

<sup>15</sup>While the United States, as amicus curiae, took the position in the District Court that "Congress by the passage of the Ports and Waterways Safety Act plainly intended to preempt the field of oil tanker regulation," Brief of the United States, May 24, 1976, at 7, its ten-page submission to the District Court was little more than a conclusory defense of federal jurisdiction. It brought to light no new language

zation, Title I of the PWSA does not deal with the entire field of tanker regulation, but is primarily directed toward authorizing the Coast Guard to establish and operate vessel traffic control systems in such ports and waterways as it deems appropriate. While Title I does contain some language of arguably preemptive effect, other language therein contemplates continuing state regulation,<sup>16</sup> and the formulation of the relationship between federal and state regulation in the statute, couched in terms of a positive preservation of state power, is so ambiguous and obscure as to be insufficient to demonstrate the requisite congressional intent. For its part Title II of the PWSA, which is primarily directed at authorizing the Coast Guard to develop "minimum" design and construction standards for oil tankers, contains no reference at all to state power to take action in the same area.

### **III. The Federal Scheme Under the Ports and Waterways Safety Act is Compatible with Continuing State Regulation**

Choosing not to rely on statutory language or legislative history, the District Court rested its pre-emption holding on the determination that the PWSA established a "comprehensive federal scheme" for regulating oil tankers, a scheme which contemplated "national uniformity" and which did not "invite" or legislative history, nor did it demonstrate in any factual way how Chapter 125 would interfere with federal regulation under the PWSA.

<sup>16</sup>See e.g. 33 U.S.C. § 1222 (b) and (c).

state sharing of regulatory authority (App. 7a-9a). Comprehensiveness alone, however, cannot be equated with an intent to preempt.<sup>17</sup> Comprehensive federal statutory schemes may leave the states with broad powers to achieve complementary goals under state legislation. See, e.g., *DeCanas v. Bica*, 424 U.S. 351 (1976); *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973). The question in any one case is whether, in the absence of clear congressional intent, the congressional scheme leaves room for state action.

The PWSA is not so comprehensive, in intent or implementation, as to oust the states from a regulatory role in the marine pollution area. Title I of the PWSA does not require vessel traffic systems and services for all ports, nor does it contemplate that such systems will necessarily include all aspects of navigational safety within a particular port or harbor area. In the case of Puget Sound, although the Coast Guard has established and is operating a rudimentary routing and reporting system, see 39 Fed.

<sup>17</sup>In the District Court, ARCO relied on two decisions—*City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and *Northern States Power Co. v. The State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972)—for the proposition that a comprehensive federal regulatory scheme must necessarily preclude complementary state regulation. However, both cases are limited to rather special circumstances, radiation standards in Northern States and air transportation management in *Burbank*, where there was a history of exclusive federal control and no history of state police power regulation. As such, they have little application to an area such as port and waterway safety, where the state has long been held to have "exceptional scope for the exercise of its regulatory power." "Southern Pacific Co. v. State of Arizona ex rel. Sullivan", 325 U.S. 761, 783 (1945).

*Reg. 25430 (1974), 33 C.F.R. Part 161, Subpart B (Exhibit T)*, that system does not involve comprehensive control of tanker movement. For example, while traffic lanes are established to keep vessels separated, this system does not purport to address other problems of tanker movement, such as lack of maneuverability and loss of power — problems addressed by Chapter 125's tug escort and design feature provisions. Moreover, the Coast Guard has neither proposed nor adopted regulations establishing general access limits for Puget Sound. Obviously, all the provisions of Chapter 125 are consistent with the Puget Sound vessel traffic system.<sup>18</sup> Indeed, the federal and state systems have operated in a complementary and successful manner since September of 1975 when the state statute took effect.

It is equally clear that the design and construction standards authorized and adopted under the PWSA are not comprehensive in the sense of precluding state efforts to promote higher standards. The Coast Guard has stated that these regulations "are not a complete and comprehensive answer" to the tanker pollution problem. United States Coast Guard, *Final Environmental Impact Statement on Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade at 1* (August 15, 1975) (Exhibit X). Moreover, the Coast Guard, in implementing the

<sup>18</sup>While the Coast Guard has published an Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976), indicating that it is considering the possibility of proposing general regulations for tug escorts, it has not actually proposed, yet alone adopted, such regulations.

PWSA, has recognized that design features of Chapter 125, e.g., double bottoms and twin screws, may be appropriate in particular local environments, even though it has determined that they should not be mandated on a national basis. *Id.* at 64, 73. Chapter 125 does not mandate design standards as such—a medium sized oil tanker not meeting its standards is free to enter Puget Sound as long as it is accompanied by a tug escort. The act simply expresses a state preference for particular design and equipment features.<sup>19</sup>

If the scheme of the PWSA is not so comprehensive as to preclude state action, neither does it require or contemplate uniform national implementation. The PWSA itself recognizes that operating requirements, such as tug escorts and access limitations, may differ as a function of particular, local navigational hazards, while, as just noted, the need for particular design and construction features may depend upon such factors as the environment and geographic location in which the ship is operating. In light of these local variations, there is no inherent need for exclusive federal control and thus no reason to imply preemption.

To take just one example of the absence of need for exclusive federal control, the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*, specifically vests

<sup>19</sup>There is no dispute, it should be pointed out, that any tanker between 40,000 DWT and 125,000 DWT which has the design and equipment features embodied in Section 3(2) of Chapter 125 can also fully comply with the rules and regulations promulgated by the Coast Guard under the PWSA.

in states an absolute veto over whether supertankers may serve federally licensed facilities located more than three miles off their shores. 33 U.S.C. § 1503 (c) (9). It is difficult to conclude that Congress could have intended that the State of Washington was empowered to exclude supertankers at offshore ports but not so empowered in inland waters where the dangers of transportation are greater, as are the environmental values to be preserved.

#### **IV. The Ports and Waterways Safety Act Must Be Interpreted Consistently With Overall Federal Policy for Protection of the Marine and Coastal Environment**

Finally, while the District Court characterized the PWSA as not "inviting" state participation in its regulatory scheme (App. 9a), the issue in this case is a broader one of how Chapter 125 relates to the overall federal approach to oil pollution control. To be sure, there is "overlap", as the District Court stated (App. 11a), between the purposes of Chapter 125 and the PWSA, but such overlap is emphatically not grounds for upsetting state police power regulation. As this Court stated in *New York State Department of Public Services v. Dublino*, 413 U.S. 405, 419 (1973):

"\* \* \* It would be incongruous for Congress on the one hand to promote [a given goal] \* \* \* and on the other to prevent states from

undertaking supplementary efforts towards this very same end."<sup>29</sup>

Of particular importance to this controversy is the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.* Regulation of land and water resources are intimately related. The District Court's holding that the State of Washington has no power to regulate the manner in which crude oil reaches its refineries fundamentally undercuts the State's land and water use planning and regulatory authority over the coastal zone, specifically recognized by Congress in the Coastal Zone Management Act.

<sup>29</sup>Chapter 125 must be set in the context of the overall federal approach to the protection of marine and coastal resources. The fundamental national policy stated in the Federal Water Pollution Control Act Amendments of 1972, is

"to recognize, preserve and protect the primary responsibilities of the states to prevent, reduce and eliminate pollution. \* \* \*" 33 U.S.C. § 1251(b).

The Estuarine Areas Act of 1968, 16 U.S.C. §§ 1221 *et seq.* provides: " \* \* \* it is declared to be the policy of Congress to recognize, preserve and protect the responsibilities of the States in protecting, conserving, and restoring the estuaries of the United States." 16 U.S.C. §1221.

The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*, which establishes a program of federal grants to coastal states for developing coastal zone management programs, is based in part upon the finding that,

"The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the land and waters in the coastal zone. \* \* \*" Section 301(h), 16 U.S.C. § 1451(h).

The Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*, which provides for federal licensing of offshore ports for supertankers, declares that its purpose is, *inter alia*, to "protect the interests of the United States and those adjacent coastal states in the location, construction and operation of deepwater ports," 33 U.S.C. §1502(a)(3), and to "protect the rights and responsibilities of states and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law." 33 U.S.C. §1502(a)(4). The PWSA, and its relationship to state law, must be interpreted consistently with this mass of recently enacted federal legislation.

On June 1, 1976, the Secretary of Commerce approved the State of Washington's Coastal Zone Management Program (Exhibit AAA). Chapter 125 is part of the Coastal Zone Management Program in two ways. First, it is specifically mentioned in the Program. Second, and more importantly, it is an essential element of the State's policy, incorporated in the Program, to move the bulk of oil tanker traffic, particularly supertanker traffic, outside the environmentally sensitive waters of Puget Sound.<sup>21</sup>

It is not Appellants' contention that approval of the Coastal Zone Management Program "somehow waives federal preemption in the area" (App. 11a). Appellants recognize that Section 307(e) of the Coastal Zone Management Act, 16 U.S.C. § 1456(e), makes it clear that federal approval of a state program does not override other federal enactments. Nonetheless, those enactments, and the authority of federal agencies thereunder, must be interpreted consistently with the purposes of the Coastal Zone Management Act and its intention that the federal and state regulatory efforts be harmonized to the fullest extent possible. In the instant case, given the absence of a clear expression of congressional intent to preempt, federal approval of the State Program provides

<sup>21</sup>The Program states:

"The State of Washington, as a matter of overriding policy, positively supports the concept of a single, major crude petroleum receiving and transfer facility at or west of Port Angeles. This policy shall be the fundamental, underlying principle for state actions on the north Puget Sound and straits oil transportation issues. \* \* \*" (Exhibit AAA).

a further reason to hold that Chapter 125 is in harmony with federal statutory policy.

#### V. Chapter 125 Does Not Violate the Commerce Clause of the Constitution

ARCO contended below that Chapter 125 impermissibly conflicted with the Commerce Clause. Although the issue was fully briefed and extensively argued orally to the District Court, the Court did not decide that issue because it held Chapter 125 invalid as hereinbefore described.

Chapter 125 is a legitimate exercise of the State's police power. The act is designed to protect a legitimate local interest — an unpolluted Puget Sound. Chapter 125 seeks to protect the public health and welfare, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); preserve valuable natural resources, *Cities Service Gas Co. v. Peerless Co.*, 340 U.S. 179 (1950); regulate oversized vessels used in commercial transportation, *South Carolina Highway Department v. Barnwell Bros.*, 303 U.S. 177 (1938); and regulate harbors and docking facilities, *Clyde Mallory Lines, Inc. v. Alabama*, 296 U.S. 261, 267-268 (1935). Additionally, Chapter 125 is valid because it is an evenhanded regulation, is not preempted by federal action, and is not unduly burdensome on interstate commerce. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).

The burdens imposed by the statute on interstate commerce are minimal, if not wholly speculative.

Moreover, there is no national uniform policy on the subject of harbor and internal water regulations for oil tankers that would displace the historic authority of states and local harbors to establish such regulations for themselves. *Kelly v. Washington*, 302 U.S. 1 (1937); *The James Gray v. The John Fraser*, 62 U.S. (21 How.) 184 (1858).

#### **VI. Chapter 125 Does Not Violate the Treaty Making Clause**

ARCO also contended below that Chapter 125 impermissibly interfered with the federal power to make treaties and to regulate foreign affairs; the District Court did not decide the issue. But state regulations, like Chapter 125, of a subject over which the federal government also exercises authority is allowable, even where the regulation may affect foreign affairs. See *DeCanas v. Bica*, 424 U.S. 351 (1976).

Washington's regulatory program does not conflict with any exercised federal treaty or foreign affairs power.

#### **VII. The Eleventh Amendment Precluded District Court Jurisdiction Over State of Washington Defendants**

The State of Washington defendants, as they did below, contend that the District Court lacked the jurisdiction to entertain this suit against them, due to the Eleventh Amendment. Although the District Court found the memorandum in support of defendants' position "persuasively argued," the Court re-

jected defendants' motion to dismiss. The State of Washington believes that it is protected by the Eleventh Amendment, and that there are not present here the reasons for the rule announced in *Ex Parte Young*, 209 U.S. 123 (1908), e.g., the State's Uniform Declaratory Judgments Act, Chapter 7.24 RCW, gives to ARCO the same right in state court that it chose to pursue in federal court. The rule of *Ex Parte Young* should be properly defined and applied so as not to deny the state the Amendment's protection. If that cannot be done, then the rule, a fiction controversial as its announcement and productive in later years of strained and inconsistent opinions, should be overruled to the extent that it denies a state the Amendment's protection in a case of this precise nature.

#### **CONCLUSION**

Chapter 125 is an integral part of an overall scheme of the State of Washington that contemplates both the protection of the confined waters of Puget Sound and the accommodation of the oil and petroleum industry that exists within the State of Washington. The protection against oil spills the chapter provides is a matter of fundamental importance to the people of the State. This Court has often recognized in recent years that diverse local solutions to pressing and varying social and environmental concerns are vital to a healthy federal system. See generally Note, *The Preemption Doctrine: Shift-*

*ing Perspective on Federalism and the Burger Court*,  
75 Colum. L. Rev. 623 (1975).

To hold as the District Court has done that the State of Washington is without power to protect itself against oil spills before they occur runs counter to the overriding purpose of the PWSA itself to ensure adequate protection of this country's marine and coastal resources. The far-reaching results wrought by the District Court's holding cannot be derived from and are inconsistent with the purpose and intent of the PWSA.

Accordingly, appellants respectfully submit that the federal questions presented herein are substantial and warrant this Court's plenary review.

Respectfully submitted,

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Date: January 4, 1977

**APPENDIX A**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

No. C-75-648-M

**Order**

ATLANTIC RICHFIELD COMPANY,

*Plaintiff,*

and

SEATRAIN LINES, INCORPORATED,

*Intervening Plaintiff,*

vs.

DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. McEACHRAN, Whatcom County Prosecuting Attorney,

*Defendants,*

and

COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, INC., and CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney,

*Intervening Defendants.*

THIS MATTER came before the undersigned, one of the three judges empanelled to hear and determine

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the above-entitled cause, in accordance with Title 28 U.S.C. §§ 2281 and 2284 and in furtherance of the unanimous opinion of the said three judges which has now been filed herein, it is hereby

ORDERED, ADJUDGED and DECREED that Chapter 125, Laws of Washington, 1975, 1st Extra Session, codified at R.C.W. §§ 88.16.170, *et seq.* (The Tanker Law) be and the same is hereby declared null and void and of no force and effect. It is further

ORDERED that the application of the plaintiff for an order enjoining the responsible officials of the State of Washington from enforcing the said statute pending any appeal of this matter be and the same is hereby denied; and it is further

ORDERED that no party to the cause shall recover costs.

DATED this 23rd day of September 1976.

WALTER T. McGOVERN  
Chief United States District Judge

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**APPENDIX B**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

No. C-75-648-M

(Three-Judge Court)

**Order of Permanent Injunction**

ATLANTIC RICHFIELD COMPANY,

*Plaintiff,*

and

SEATRAIN LINES, INCORPORATED,

*Intervening Plaintiff,*

vs.

DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. McEACHRAN, Whatcom County Prosecuting Attorney,

*Defendants,*

and

COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, INC., and CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney.

*Intervening Defendant.*

THIS MATTER came on to be heard before the undersigned Judges of the above-entitled Court on the motion of the plaintiff for a permanent injunction.

The matter having been argued and considered, and the Three-Judge Court having determined and declared that Chapter 125, Laws of Washington, 1975, 1st Extra Session, codified in R.C.W. §§ 88.16-.170, *et seq.* (the Tanker Law) is null and void and of no force and effect; and it appearing that the defendants will attempt to enforce said laws unless otherwise enjoined, and it appearing that plaintiffs are entitled to the relief sought, Now, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendants and their successors in office and all others acting in behalf of them or any of them are hereby permanently enjoined from enforcing or attempting to enforce the aforesaid statute.

This Order is stayed until the 15th day of December 1976.

DATED this 12th day of November 1976.

ALFRED T. GOODWIN  
United States Circuit Judge

WILLIAM G. EAST  
United States District Judge

WALTER T. McGOVERN  
United States District Judge

### **APPENDIX C**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

No. C-75-648-M

#### **Opinion**

ATLANTIC RICHFIELD COMPANY,  
*Plaintiff*,  
and  
SEATRAIN LINES, INCORPORATED,  
*Intervening Plaintiff*,  
vs.

DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. MCEACHRAN, Whatcom County Prosecuting Attorney,

*Defendants*,

and

COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, INC., and CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney,

*Intervening Defendants*.

Before: GOODWIN, Circuit Judge, and McGOVERN  
and EAST, District Judges.

PER CURIAM.

Atlantic Richfield Company (Arco) and Seatrain Lines, Inc., sued named officials of the State of Washington to enjoin enforcement of a 1975 Washington law regulating oil tankers operating in the Puget Sound. Jurisdiction is conferred by 28 U.S.C. §§ 1331 and 1337, and this three-judge court was convened in accordance with 28 U.S.C. §§ 2281, 2284.<sup>1</sup>

At the outset, the State of Washington challenges our jurisdiction, asserting sovereign immunity under the Eleventh Amendment. Aware of the rule in *Ex Parte Young*, 209 U.S. 123 (1908), the State invites us to "overrule" it, or at least to restrict the scope of cases falling within the *Young* "exception" to the Eleventh Amendment. The invitation is attractively and persuasively argued, but we decline it. The Supreme Court, if it chooses to do so,<sup>2</sup> will have ample opportunity to reconsider *Young*.

The challenged statutes are found in Chapter 125, Laws of Washington, 1975, 1st Extra Sess., codified at R.C.W. §§ 88.16.170, *et seq.* (the Tanker Law). The Tanker Law regulates oil tankers operating in Puget Sound. Section 2 of the Tanker Law

<sup>1</sup>The Three-Judge Court Act was modified by ..... Stat. .... (1976). Section 7 of that modification specifically denied any retroactive application of the change. Since this case was heard before the change, our jurisdiction is determined by the former law.

<sup>2</sup>See 28 U.S.C. § 1253 (1970).

requires any tanker in excess of 50,000 deadweight tons (dwt) to employ a locally licensed pilot. Section 3(1) absolutely prohibits "supertankers", that is, those larger than 125,000 dwt. And § 3(2) prescribes some minimum design specifications (shaft horsepower, twin screws, double bottoms, and twin radars) for tankers between 40,000 and 125,000 dwt. A proviso in § 3(2) waives these design specifications for tankers accompanied by an appropriate complement of tugboats.

Arco and Seatrain contend that the state's restrictions are preempted by federal regulation in the field, are violative of the commerce clause, and invade the foreign affairs powers of the United States.

We are persuaded that federal law has preempted the field. Title I of the Ports and Waterways Safety Act of 1972 (the PWSA), 33 U.S.C. §§ 1221 *et seq.*, establishes a comprehensive federal scheme for regulating the operations, traffic routes, pilotage, and safety design specifications of tankers. Under the PWSA, the Coast Guard can create traffic-control systems for Puget Sound,<sup>3</sup> and it has done so. 33 C.F.R. Part 161, Subpart B. The PWSA gives the Coast Guard authority to restrict and even exclude tankers from Puget Sound under adverse or hazardous conditions. 33 U.S.C. § 1221(3)(iv).

Title II of the PWSA amended the Tank Vessel Act of 1936, 46 U.S.C. §§ 391a. It empowered the

<sup>3</sup>By "Puget Sound" we mean those waters east of a line extending from Discovery Island Light south to New Dungeness Light. R.C.W. § 88.16.190.

Coast Guard to regulate design, construction, and maintenance of tankers operating in United States waters. See proposed regulations, 41 Fed. Reg. 15859 (April 15, 1976).

The purpose of the original Tank Vessel Act, and of Title II of PWSA, was to establish a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions under which they would be permitted to operate. Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA. The PWSA has preempted § 3(2) of Washington's Tanker Law.

Washington asserts that the minimum design specifications required by § 3(2) of the Tanker Law were not preempted, because they can be avoided if the tanker has a tugboat escort. Congress has given the Coast Guard authority to require tugboat escorts in Puget Sound under hazardous conditions. 33 U.S.C. § 1221(3)(iv). And the Coast Guard has considered doing this. Department of Transportation, Coast Guard, Final Environmental Impact Statement [on the] Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade 71 (August 15, 1975). We believe that the tugboat-escort provision of the Tanker Law has also been preempted by the federal law.

Arco and Seatrain also argue that § 2 of Washington's Tanker Law (requiring a local pilot on all

tankers larger than 50,000 dwt) has been preempted. Insofar as the Tanker Law prohibits a tanker "enrolled in the coastwise trade" from navigating Puget Sound unless it has a local pilot, the statute is void; it conflicts with clear federal law on that subject. 46 U.S.C. §§ 215, 364 (1970).

Recognizing the difficulty of its position, the State of Washington argues that its Tanker Law is part of a comprehensive coastal management plan, and that it should be upheld on that ground. "Cooperative federalism" has been the congressional policy for designing a United States environmental policy. The Congress funded and encouraged the coastal states to design comprehensive and forward-looking coastal management plans. 16 U.S.C. §§ 1451 *et seq.* Congress has invoked "cooperative federalism"—or at least some state involvement—in virtually all of its water-related regulatory programs: The Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.*; the Clean Air Act, 42 U.S.C. § 1857; the Estuarine Act of 1968, 16 U.S.C. §§ 1221 *et seq.*; and the Deepwater Ports Act of 1974, 33 U.S.C. §§ 1501 *et seq.*

Congress has used "cooperative federalism" in forming environmental regulations. But the State of Washington fails to note that in those statutes Congress explicitly invited state participation in various phases of the formation of the regulatory scheme. The PWSA, on the other hand, does not invite such

state participation; it does not share regulatory authority over oil tankers with the states.

Supporting its position, Washington cites *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), and *Huron Portland Cement v. City of Detroit*, 362 U.S. 440 (1960). The *Askew* case upheld Florida's law imposing strict liability in tort on oil spillers. The Court held that the state regulatory scheme did not conflict with federal regulation of oil tankers. But that Florida statute did not attempt to regulate the design of the tanker or tanker operations, which were already federally regulated. The *Askew* case involved the Federal Water Quality Control Act, not the PWSA, and the holding of the Court was in part reflective of the congressional policy of "cooperative federalism" in the Federal Water Quality Control Act.

In the *Huron Portland Cement* case, a city's smoke-control ordinance was applied against a vessel engaged in interstate commerce. The Court observed that the environmental purpose of Detroit's ordinance was not preempted by federal safety inspection regulations. There was "no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance." 362 U.S. at 446. Since the PWSA introduced environmental considerations into the federal tanker regulations,<sup>4</sup> the State of Wash-

<sup>4</sup>One of the primary reasons for the passage of the Ports and Waterways Safety Act was concern over the environment. The introductory clause of Title I states that the purpose is "to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage." 33 U.S.C. § 1221.

ington cannot say that there is "no overlap" between the state and federal laws.

Finally, the State of Washington asserts that the Commerce Department's approval of its coastal management plan (to which the Tanker Law is related) somehow waives federal preemption of the area. The Secretary of Commerce can approve a state's coastal management plan (thereby making it eligible for federal funding) only if "the views of Federal agencies principally affected by such program have been adequately considered." 16 U.S.C. § 1456(b) (1970). The Secretary may or may not have "considered" the views of the Coast Guard. The Secretary may or may not have noticed the preemptive effect of the PWSA on Washington's Tanker Law. That is not before us. We cannot read the Secretary's approval of a coastal management plan, to which the Tanker Law is only collaterally related, as foreclosing our inquiry into the federal preemption of oil tanker regulation.

Finally, the state and the other states filing amici briefs have argued with some conviction that a state's officials, responsible to its voters, are better able to protect the state's shoreline environment than is the Commandant of the Coast Guard, headquartered on the other side of the continent. This argument presents legislative, rather than judicial, policy considerations.

Because the Washington Tanker Law conflicts with federal law preempting the same subject matter,

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the state law is void. The plaintiffs have asserted a number of other grounds for declaring the statute void. It is unnecessary to reach these other points.

It is likewise unnecessary to grant an injunction. It is presumed that the responsible officials of the State of Washington will not undertake to enforce the statute pending such further appeals as may be taken. The clerk will enter judgment.

Neither party shall have costs.

**ALFRED T. GOODWIN**  
United States Circuit Judge

**WALTER T. McGOVERN**  
United States District Judge

**WILLIAM G. EAST**  
United States District Judge

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**APPENDIX D**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE  
No. C-75-648-M

**Judgment, 3-Judge Court**

ATLANTIC RICHFIELD Co., et al,  
*Plaintiffs,*

vs.

DANIEL J. EVANS, Governor of the State of  
Washington, et al,

*Defendants.*

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This matter having come on for consideration before the 3-Judge Court composed of the Honorable Judges Alfred T. Goodwin, United States Circuit Judge, Walter T. McGovern, United States District Judge, William G. East, United States District Judge, presiding, and the issues having been duly considered and an opinion and order having been duly rendered that Chapter 125, Laws of Washington, 1975, 1st Extra Session, codified at R.C.W. §§ 88.16.170, *et seq.* (The Tanker Law) be and the same is hereby declared null and void and of no force and effect and that application of plaintiff for an order enjoining the responsible officials of the State of Washington from enforcing said statute pending any appeal of this matter is denied.

IT IS HEREBY ORDERED AND ADJUDGED, that judgment is hereby entered in favor of Plaintiffs against Defendants, with no costs.

DATED this 24th day of September, 1976.

**JOHN A. MCLELLAN**  
Deputy Clerk, U.S. District Court

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**APPENDIX E(1)**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

Civil No. C-75-648-M

(Three Judge Court)

**Notice of Appeal to the Supreme Court of the  
United States**

ATLANTIC RICHFIELD COMPANY,

*Plaintiff,*

and

SEATRAIN LINES, INCORPORATED,

*Intervening Plaintiff,*

vs.

DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. MCEACHRAN, Whatcom County Prosecuting Attorney,

*Defendants,*

and

COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, INC., and CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney,

*Intervening Defendants.*

15a

Notice is hereby given that Daniel J. Evans, Governor of the State of Washington; Slade Gorton, Attorney General of the State of Washington; William C. Jacobs, Chairman, and Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther, and J. Q. Paull, Members, Board of Pilotage Commissioners; and David S. McEachran, Whatcom County Prosecuting Attorney, defendants above named, hereby appeal to the Supreme Court of the United States from the "Judgment" in this cause dated and entered September 24, 1976 and the "Order" in this cause dated September 23, 1976 and entered September 24, 1976, declaring Chapter 125, Laws of Washington, 1975, 1st Extraordinary Session, codified as RCW 88.16.170, *et seq.*, null and void and of no effect, and from the "Order of Permanent Injunction" in this cause dated and entered November 12, 1976, enjoining the defendants from enforcing or attempting to enforce the aforesaid statute.

This appeal is taken pursuant to 28 U.S.C. § 1253 and 28 U.S.C. § 2101.

DATED: November 19, 1976

**CHARLES B. ROE, JR.**

Senior Assistant Attorney General  
Of Attorneys for Defendants Daniel J.  
Evans, Slade Gorton, William C. Jacobs,  
Harry A. Greenwood, Benjamin W. Joyce,  
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16a

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**DAVID S. McEACHRAN, Defendant**

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**APPENDIX E(2)**

Civil No. C-75-648-M

**(Three Judge Court)**

**Notice of Appeal to the Supreme Court of the  
United States**

**AT SEATTLE**

**ATLANTIC RICHFIELD COMPANY,**

*Plaintiff,*

and

**SEATRAIN LINES, INCORPORATED,**

*Intervening Plaintiff,*

vs.

**DANIEL J. EVANS, Governor of the State of  
Washington; SLADE GORTON, Attorney General**

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of the State of Washington; WILLIAM C. JACOBS,  
Chairman, and HARRY A. GREENWOOD, BENJAMIN  
W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL,  
Members, Board of Pilotage Commissioners;  
and DAVID S. McEACHRAN, Whatcom County  
Prosecuting Attorney,

*Defendants,*

and

COALITION AGAINST OIL POLLUTION, NATIONAL  
WILDLIFE FEDERATION, SIERRA CLUB, ENVIRON-  
MENTAL DEFENSE FUND, INC., and CHRISTOPHER  
T. BAYLEY, King County Prosecuting Attorney,  
*Intervening Defendants.*

Notice is hereby given that Coalition Against  
Oil Pollution, National Wildlife Federation, Sierra  
Club, and Environmental Defense Fund, Inc., inter-  
vening defendants, hereby appeal to the Supreme  
Court of the United States from the "Judgment" in  
this cause dated and entered September 24, 1976 and  
the "Order" in this cause dated September 23, 1976  
and entered September 24, 1976, declaring Chapter  
125, Laws of Washington, 1975, 1st Extraordinary  
Session, codified as RCW 88.16.170, *et seq.*, null and  
void and of no effect, and from the "Order of Per-  
manent Injunction" in this cause dated and entered  
November 12, 1976, enjoining the defendants from  
enforcing or attempting to enforce the aforesaid  
statute.

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This appeal is taken pursuant to 28 U.S.C. § 1253 and 28 U.S.C. § 2101.

DATED: November 19, 1976.

**THOMAS H. S. BRUCKER**

Of Attorneys for Intervening Defendants  
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**APPENDIX E(3)**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

**Notice of Appeal to the Supreme Court of the  
United States**

Civil No. C-75-648-M  
**(Three Judge Court)**

ATLANTIC RICHFIELD COMPANY,

*Plaintiff,*

and

SEATRAIN LINES, INCORPORATED,

*Intervening Plaintiff,*

vs.

DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; and

DAVID S. MCEACHRAN, Whatcom County Prosecuting Attorney,

*Defendants,*

and

COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, INC., and CHRISTOPHER

20a

T. BAYLEY, King County Prosecuting Attorney,  
*Intervening Defendants.*

Notice is hereby given that Christopher T. Bayley, King County Prosecuting Attorney, intervening defendant, hereby appeals to the Supreme Court of the United States from the "Judgment" in this cause dated and entered September 24, 1976 and the "Order" in this cause dated September 23, 1976 and entered September 24, 1976, declaring Chapter 125, Laws of Washington, 1975, 1st Extraordinary Session, codified as RCW 88.16.170, *et seq.*, null and void and of no effect, and from the "Order of Permanent Injunction" in this cause dated and entered November 12, 1976, enjoining the defendants from enforcing or attempting to enforce the aforesaid statute.

This appeal is taken pursuant to 28 U.S.C. § 1253 and 28 U.S.C. § 2101.

DATED: November 19, 1976.

JOHN E. KEEGAN

Of Attorneys for Intervening Defendant  
Christopher T. Bayley

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21a

**APPENDIX F(1)**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

Civil No. C-75-648-M

**(Three Judge Court)**

**Notice of Appeal**

ATLANTIC RICHFIELD COMPANY,

*Plaintiff,*

and

SEATRAIN LINES, INCORPORATED,

*Intervening Plaintiff,*

vs.

DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. McEACHRAN, Whatcom County Prosecuting Attorney,

*Defendants,*

and

COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, INC., and CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney,  
*Intervening Defendants.*

22a

Notice is hereby given that Daniel J. Evans, Governor of the State of Washington; Slade Gorton, Attorney General of the State of Washington; William C. Jacobs, Chairman, and Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther, and J. Q. Paull, Members, Board of Pilotage Commissioners; and David S. McEachran, Whatcom County Prosecuting Attorney, defendants above named, and Coalition Against Oil Pollution, National Wildlife Federation, Sierra Club, Environmental Defense Fund, Inc., and Christopher T. Bayley, King County Prosecuting Attorney, Intervening defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the Order declaring void and of no effect Chapter 125, Laws of Washington, 1975, 1st Extraordinary Session, codified as RCW 88.16.170, *et seq.*, dated September 23, 1976, and that portion of the Judgment of this Court entered on September 24, 1976, to the same effect.

This Notice of Appeal relates to an Order and Judgment of a three-judge court and is filed as a precaution to insure the defendants' and intervening defendants' right to appeal the aforementioned Order and Judgment. Several motions and requests, including (1) a motion for a permanent injunction by plaintiff and (2) should that motion be granted, a motion by defendants and intervening defendants to stay the effectiveness of a permanent injunction pending completion of appeals initiated by defend-

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ants and intervening defendants, are presently before the Court for consideration. Pursuit of the appeal, initiated by this Notice, appears to depend on the rulings taken on the aforementioned motions.

DATED: October 21, 1976

**CHARLES B. ROE, JR.**

Senior Assistant Attorney General  
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Harry A. Greenwood, Benjamin W. Joyce,  
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/s/

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**APPENDIX F(2)**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

Civil No. C-75-648-M  
**(Three Judge Court)**

**Notice of Appeal to the United States Court  
of Appeals for the Ninth Circuit**

ATLANTIC RICHFIELD COMPANY,  
*Plaintiff*,

and

SEATRAIN LINES, INCORPORATED,  
*Intervening Plaintiff*,  
vs.

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DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. MCEACHRAN, Whatcom County Prosecuting Attorney, *Defendants*, and COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, INC., and CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney, *Intervening Defendants*.

Notice is hereby given that Daniel J. Evans, Governor of the State of Washington; Slade Gorton, Attorney General of the State of Washington; William C. Jacobs, Chairman, and Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther, and J. Q. Paull, Members, Board of Pilotage Commissioners; and David S. McEachran, Whatcom County Prosecuting Attorney, defendants above named; and Coalition Against Oil Pollution, National Wildlife Federation, Sierra Club, Environmental Defense Fund, Inc. and Christopher T. Bayley, King County Prosecuting Attorney, Intervening defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the "Order of Permanent Injunction" in this action dated Novem-

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ber 12, 1976, enjoining the defendants from enforcing or attempting to enforce Chapter 125, Laws of Washington, 1975, 1st Extraordinary Session, codified as RCW 88.16.170, *et seq.*

**DATED:** November 19, 1976.

**CHARLES B. ROE, JR.**

Senior Assistant Attorney General  
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Harry A. Greenwood, Benjamin W. Joyce,  
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**28a**

**APPENDIX G**

**ARTICLE VI, CLAUSE 2  
(SUPREMACY CLAUSE)**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**29a**

**APPENDIX H**

**ARTICLE I, SECTION 8, CLAUSE 3  
(COMMERCE CLAUSE)**

Section 8. The Congress shall have Power  
\* \* \*

To regulate Commerce with foreign Nations,  
and among the several States, and with the Indian  
Tribes; \* \* \*

**APPENDIX I**

**Chapter 88.16 Revised Code of Washington  
(Chapter 125)**

**88.16.170 Oil tankers—Intent and purpose.** Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.

The legislature also recognizes Puget Sound and adjacent waters are a relatively confined salt water environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.

The legislature further recognizes that certain areas of Puget Sound and adjacent waters have limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.

For these reasons, it is important that large oil tankers be piloted by highly skilled persons who are familiar with local waters and that such tankers have sufficient capability for rapid maneuvering responses.

It is therefore the intent and purpose of RCW 88.16.180 and 88.16.190 to decrease the likelihood of oil spills on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ

Washington state licensed pilots and, if lacking certain safety and maneuvering capability requirements, to be escorted by a tug or tugs while navigating on certain areas of Puget Sound and adjacent waters. [1975 1st ex.s. c 125 § 1.]

**Severability—1975 1st ex.s. c 125:** "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1975 1st ex.s. c 125 § 6.]

**Study authorized and directed:** "The House and Senate Transportation and the Utilities Committees are authorized and directed to study the feasibility, benefits, and disadvantages of requiring similar pilot and tug assistance for vessels carrying other potentially hazardous materials and to submit their findings and recommendations prior to the 45th session of the Washington legislature in January, 1977. Such study shall also include a report on the feasibility, benefits and disadvantages of requiring vessels under tug escort to observe a speed limit, and such study shall include a discussion of the impact of a speed limit on the maneuverability of the vessel, the effectiveness of the tug escort and other legal and technical considerations material and relevant to the required study. Such study shall also include an evaluation and recommendations as to whether there should be a transfer of all duties and responsibilities of the board of pilotage commissioners to the Washington utilities and transportation commission or other state agency, and alternate methods for establishing fair and equitable rates for tug escort and pilot transfer." [1975 1st ex.s. c 125 § 5.]

*Discharge of oil into state waters: Rcw 90.48.315-90.48.365.*

**88.16.180 Oil tankers — State licensed pilot required.** Notwithstanding the provisions of RCW 88.16.070, any oil tanker, whether enrolled or registered, of fifty thousand deadweight tons or greater, shall be required to take a Washington state licensed pilot while navigating Puget Sound and adjacent waters and shall be liable for any pay pilotage rates pursuant to RCW 88.16.030 as now or hereafter amended. [1975 1st ex.s. c 125 § 2.]

**Severability — 1975 1st ex.s. c 125:** See note following RCW 88.16.170.

**88.16.190 Oil tankers—Restricted waters—Standard safety features required—Exemptions.** (1) Any oil tanker, whether enrolled or registered, of greater than one hundred and twenty-five thousand deadweight tons shall be prohibited from proceeding beyond a point east of a line extending from Discovery Island light south to New Dungeness light.

(2) An oil tanker, whether enrolled or registered, of forty to one hundred and twenty-five thousand deadweight tons may proceed beyond the points enumerated in subsection (1) if such tanker possesses all of the following standard safety features:

(a) Shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons; and

(b) Twin screws; and

(c) Double bottoms, underneath all oil and liquid cargo compartments; and

(d) Two radars in working order and operating, one of which must be collision avoidance radar; and

(e) Such other navigational position location systems as may be prescribed from time to time by the board of pilots<sup>120</sup> commissioners:

*Provided*, That, if such forty to one hundred and twenty-five thousand deadweight ton tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker, subsection (2) of

this section shall not apply: *Provided further*, That additional tug shaft horsepower equivalencies may be required under certain conditions as established by rule and regulation of the Washington utilities and transportation commission pursuant to chapter 34.04 RCW: *Provided further*, That a tanker of less than forty thousand deadweight tons is not subject to the provisions of RCW 88.16.170 through 88.16.190. [1975 1st ex.s. c 125 § 3.]

**APPENDIX J****PORTS AND WATERWAYS SAFETY ACT  
OF 1972****PUBLIC LAW 92-340; 86 STAT. 424**

[H. R. 8110]

An Act to promote the safety of ports, harbors, waterfront areas, and navigable waters of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

This Act may be cited as the "Ports and Waterways Safety Act of 1972".

**TITLE I—PORTS AND WATERWAYS SAFETY AND ENVIRONMENTAL QUALITY**

Sec. 101. In order to prevent damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters; and to protect the navigable waters and the resources therein from environmental harms resulting from vessel or structure damage, destruction, or loss, the Secretary of the department in which the Coast Guard is operating may—

- (1) establish, operate, and maintain vessel traffic services and systems for ports, harbors, and other waters subject to congested vessel traffic;
- (2) require vessels which operate in an

area of a vessel traffic service or system to utilize or comply with that service or system, including the carrying or installation of electronic or other devices necessary for the use of the service or system;

(3) control vessel traffic in areas which he determines to be especially hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by—

(i) specifying times of entry, movement, or departure to, from, within, or through ports, harbors, or other waters;

(ii) establishing vessel traffic routing schemes;

(iii) establishing vessel size and speed limitations and vessel operating conditions; and

(iv) restricting vessel operation, in a hazardous area or under hazardous conditions, to vessels which have particular operating characteristics and capabilities which he considers necessary for safe operation under the circumstances;

(4) direct the anchoring, mooring, or movement of a vessel when necessary to prevent damage to or by that vessel or her cargo, stores, supplies, or fuel;

(5) require pilots on self-propelled vessels engaged in the foreign trades in areas and under

circumstances where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved;

(6) establish procedures, measures, and standards for the handling, loading, discharge, storage, stowage, and movement, including the emergency removal, control and disposition, of explosives or other dangerous articles or substances (including the substances described in section 4417a(2) (A), (B), and (C) of the Revised Statutes of the United States (46 U.S.C. 391a(2) (A), (B), and (C)) on structures subject to this title;

(7) prescribe minimum safety equipment requirements for structures subject to this title to assure adequate protection from fire, explosion, natural disasters, and other serious accidents or casualties;

(8) establish water or waterfront safety zones or other measures for limited, controlled, or conditional access and activity when necessary for the protection of any vessel, structure, waters, or shore area; and

(9) establish procedures for examination to assure compliance with the minimum safety equipment requirements for structures.

Sec. 102. (a) For the purpose of this Act, the term "United States" includes the fifty States, the

District of Columbia, Puerto Rico, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

(b) Nothing contained in this title supplants or modifies any treaty or Federal statute or authority granted thereunder, nor does it prevent a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title.

(c) In the exercise of his authority under this title, the Secretary shall consult with other Federal agencies, as appropriate, in order to give due consideration to their statutory and other responsibilities, and to assure consistency of regulations applicable to vessels, structures, and areas covered by this title. The Secretary may also consider, utilize, and incorporate regulations or similar directory materials issued by port or other State and local authorities.

(d) This title shall not be applicable to the Panama Canal. The authority granted to the Secretary under section 101 of this title shall not be delegated with respect to the Saint Lawrence Seaway to any agency other than the Saint Lawrence Seaway Development Corporation. Any other authority granted the Secretary under this title shall be delegated to the Saint Lawrence Seaway Development Corporation to the extent that the Secretary determines such delegation is necessary for the proper operation of the Seaway.

(e) In carrying out his duties and responsibilities under this title to promote the safe and efficient conduct of maritime commerce the Secretary shall consider fully the wide variety of interests which may be affected by the exercise of his authority hereunder. In determining the need for, and the substance of, any rule or regulation or the exercise of other authority hereunder the Secretary shall, among other things, consider—

- (1) the scope and degree of the hazards;
- (2) vessel traffic characteristics including minimum interference with the flow of commercial traffic, traffic volume, the sizes and types of vessels, the usual nature of local cargoes, and similar factors;
- (3) port and waterway configurations and the differences in geographic, climatic, and other conditions and circumstances;
- (4) environmental factors;
- (5) economic impact and effects;
- (6) existing vessel traffic control systems, services, and schemes; and
- (7) local practices and customs, including voluntary arrangements and agreements within the maritime community.

Sec. 103. The Secretary may investigate any incident, accident, or act involving the loss or destruction of, or damage to, any structure subject to this title, or which affects or may affect the safety or en-

vironmental quality of the ports, harbors, or navigable waters of the United States. In any investigation under this title, the Secretary may issue a subpoena to require the attendance of any witness and the production of documents and other evidence. In case of refusal to obey a subpoena issued to any person, the Secretary may request the Attorney General to invoke the aid of the appropriate district court of the United States to compel compliance. Witnesses may be paid fees for travel and attendance at rates not exceeding those allowed in a district court of the United States.

Sec. 104. The Secretary may issue reasonable rules, regulations, and standards necessary to implement this title. In the exercise of his rulemaking authority the Secretary is subject to the provisions of chapters 5 and 7 of title 5, United States Code. In preparing proposed rules, regulations, and standards, the Secretary shall provide an adequate opportunity for consultation and comment to State and local governments, representatives of the marine industry, port and harbor authorities, environmental groups, and other interested parties.

Sec. 105. The Secretary shall, within one year after the effective date of this Act, report to the Congress his recommendations for legislation which may be necessary to achieve coordination and/or eliminate duplication between the functions authorized by this Act and the functions of any other agencies.

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Sec. 106. Whoever violates a regulation issued under this title shall be liable to a civil penalty of not more than \$10,000. The Secretary may assess and collect any civil penalty incurred under this title and, in his discretion, remit, mitigate, or compromise any penalty. Upon failure to collect or compromise a penalty, the Secretary may request the Attorney General to commence an action for collection in any district court of the United States. A vessel used or employed in a violation of a regulation under this title shall be liable in rem and may be proceeded against in any district court of the United States having jurisdiction.

Sec. 107. Whoever willfully violates a regulation issued under this title shall be fined not less than \$5,000 or more than \$50,000 or imprisoned for not more than five years, or both.

**TITLE II—VESSELS CARRYING CERTAIN CARGOES IN BULK**

Sec. 201. Section 4417a of the Revised Statutes of the United States (46 U.S.C. 391a)<sup>5</sup> is hereby amended to read as follows:

“Sec. 4417a. (1) Statement of Policy.—The Congress hereby finds and declares—

“That the carriage by vessels of certain cargoes in bulk creates substantial hazards to life, property, the navigable waters of the

<sup>5</sup>. 46 U.S.C.A. § 391a.

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United States (including the quality thereof) and the resources contained therein and of the adjoining land, including but not limited to fish, shellfish, and wildlife, marine and coastal ecosystems and recreational and scenic values, which waters and resources are hereafter in this section referred to as the ‘marine environment’.

“That existing standards for the design, construction, alteration, repair, maintenance and operation of such vessels must be improved for the adequate protection of the marine environment.

“That it is necessary that there be established for all such vessels documented under the laws of the United States or entering the navigable waters of the United States comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation to prevent or mitigate the hazards to life, property, and the marine environment.

“(2) Vessels Included.—All vessels, regardless of tonnage size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, which are documented under the laws of the United States or enter the navigable waters of the United States, except public vessels other than those engaged in commercial service, that shall have on board liquid cargo in bulk which is—

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"(A) inflammable or combustible, or

"(B) oil, of any kind or in any form, including but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, or

"(C) designated as a hazardous polluting substance under section 12(a) of the Federal Water Pollution Control Act (33 U.S.C. 1162); shall be considered steam vessels for the purposes of title 52 of the Revised Statutes of the United States and shall be subject to the provisions thereof: *Provided*, That this section shall not apply to vessels having on board the substances set forth in (A), (B), or (C) above only for use as fuel or stores or to vessels carrying such cargo only in drums, barrels, or other packages: *And, provided further*, That nothing contained herein shall be deemed to amend or modify the provisions of section 4 of Public Law 90-397 with respect to certain vessels of not more than five hundred gross tons: *And provided further*, That this section shall not apply to vessels of not more than five hundred gross tons documented in the service of oil exploitation which are not tank vessels and which would be subject to this section only because of the transfer of fuel from the vessels' own fuel supply tanks to offshore drilling or production facilities.

"(3) Rules and Regulations.—In order to secure effective provision (A) for vessel safety, and (B) for protection of the marine environment, the Secretary of the department in which the Coast

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Guard is operating (hereafter referred to in this section as the 'Secretary') shall establish for the vessels to which this section applies such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; and with respect to the handling and stowage of such cargo, the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life saving, fire protection, and the prevention and mitigation of damage to the marine environment; and with respect to the operation of such vessels; and with respect to the requirements of the manning of such vessels and the duties and qualifications of the officers and crew thereof; and with respect to the inspection of all the foregoing. In establishing such rules and regulations the Secretary may, after hearing as provided in subsection (4), adopt rules of the American Bureau of Shipping or similar American classification society for classed vessels insofar as such rules pertain to the efficiency of hulls and the reliability of machinery of vessels to which this section applies. In establishing such rules and regulations the Secretary shall give due consideration to the kinds and grades of such

cargo permitted to be on board such vessel. In establishing such rules and regulations the Secretary shall, after consultation with the Secretary of Commerce and the Administrator of the Environmental Protection Agency, identify those established for protection of the marine environment and those established for vessel safety.

**"(4) Adoption of Rules and Regulations.—**Before any rules or regulations, or any alteration, amendment, or repeal thereof, are approved by the Secretary under the provisions of this section, except in an emergency, the Secretary shall (A) consult with other appropriate Federal departments and agencies, and particularly with the Administrator of the Environmental Protection Agency and the Secretary of Commerce, with regard to all rules and regulations for the protection of the marine environment, (B) publish proposed rules and regulations, and (C) permit interested persons an opportunity for hearing. In prescribing rules or regulations, the Secretary shall consider, among other things, (i) the need for such rules or regulations, (ii) the extent to which such rules or regulations will contribute to safety or protection of the marine environment, and (iii) the practicability of compliance therewith, including cost and technical feasibility.

**"(5) Rules and Regulations for Safety; Inspection; Permits; Foreign Vessels.—**No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations for vessel safety

established hereunder, have on board such cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes of the United States and until a permit has been endorsed on such certificate of inspection by the Secretary, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder, and showing the kinds and grades of such cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Secretary on such certificate of inspection until such vessel has been inspected by the Secretary and found to be in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder. For the purpose of such inspection, approved plans and certificates of class of the American Bureau of Shipping or other recognized classification society for classed vessels may be accepted as evidence of the structural efficiency of the hull and the reliability of the machinery of such classed vessels except as far as existing law places definite responsibility on the Coast Guard. A certificate issued under the provisions of this section shall be valid for a period of time not to exceed the duration of the certificate of inspection on which such permit is endorsed, and shall be subject to revocation by the Secretary whenever he shall find that the vessel concerned does not comply with the conditions upon which such permit was issued: *Provided*, That rules

and regulations for vessel safety established hereunder and the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States: *And provided further*, That no permit shall be issued under the provisions of this section authorizing the presence on board any vessel of any of the materials expressly prohibited from being thereon by subsection (3) of section 4472 of this title.

**(6) Rules and Regulations for Protection of the Marine Environment; Inspection; Certification.**—No vessel subject to the provisions of this section shall, after the effective date of rules and regulations for protection of the marine environment, have on board such cargo, until a certificate of compliance, or an endorsement on the certificate of inspection for domestic vessels, has been issued by the Secretary indicating that such vessel is in compliance with such rules and regulations. Such certificate of compliance or endorsement shall not be issued by the Secretary until such vessel has been inspected by the Secretary and found to be in compliance with the rules and regulations for protection of the marine environment established hereunder. A certificate of compliance or an endorsement issued under this subsection shall be valid for a period specified therein by the Secretary and shall be subject to revocation whenever the Secretary finds that the vessel concerned does not comply with the conditions upon which such certificate or endorsement was issued.

**"(7) Rules and Regulations for Protection of the Marine Environment Relating to Vessel Design and Construction, Alteration and Repair; International Agreement.—(A)** The Secretary shall begin publication as soon as practicable of, proposed rules and regulations setting forth minimum standards of design, construction, alteration, and repair of the vessels to which this section applies for the purpose of protecting the marine environment. Such rules and regulations shall, to the extent possible, include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities.

**"(B)** The Secretary shall cause proposed rules and regulations published by him pursuant to subsection (7) (A) to be transmitted to appropriate international forums for consideration as international standards.

**"(C)** Rules and regulations published pursuant to subsection (7) (A) shall be effective not earlier than January 1, 1974, unless the Secretary shall earlier establish rules and regulations consonant with international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment. In the ab-

sence of the promulgation of such rules and regulations consonant with international treaty, convention, or agreement, the Secretary shall establish an effective date not later than January 1, 1976, for rules and regulations previously published pursuant to this subsection (7) which he then deems appropriate.

"(D) Any rule or regulation for protection of the marine environment promulgated pursuant to this subsection (7) shall be equally applicable to foreign vessels and United States-flag vessels operating in the foreign trade. If a treaty, convention, or agreement provides for reciprocity of recognition of certificates or other documents to be issued to vessels by countries party thereto, which evidence compliance with rules and regulations issued pursuant to such treaty, convention, or agreement, the Secretary, in his discretion, may accept such certificates or documents as evidence of compliance with such rules and regulations in lieu of the certificate of compliance otherwise required by subsection (6) of this section.

"(8) Shipping Documents.—Vessels subject to the provisions of this section shall have on board such shipping documents as may be prescribed by the Secretary indicating the kinds, grades, and approximate quantities of such cargo on board such vessel, the shippers and consignees thereof, and the location of the shipping and destination points.

"(9) Officers; Tankermen; Certification.—(A) In all cases where the certificate of inspection does

not require at least two licensed officers, the Secretary shall enter in the permit issued to any vessel under the provisions of this section the number of the crew required to be certified as tankermen.

"(B) The Secretary shall issue to applicants certificates as tankermen, stating the kinds of cargo the holder of such certificate is, in the judgment of the Secretary, qualified to handle aboard vessels with safety, upon satisfactory proof and examination, in form and manner prescribed by the Secretary, that the applicant is in good physical condition, that such applicant is trained in and capable efficiently to perform the necessary operations aboard vessels having such cargo on board, and that the applicant fulfills the qualifications of tankerman as prescribed by the Secretary under the provisions of this section. Such certificates shall be subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is provided in the case of suspension or revocation of licenses of officers under the provisions of section 4450 of this title.

"(10) Effective Date of Rules and Regulations.—Except as otherwise provided herein, the rules and regulations to be established pursuant to this section shall become effective ninety days after their promulgation unless the Secretary shall for good cause fix a different time. If the Secretary shall fix an effective date later than ninety days after such promulgation, his determination to fix such a later date shall be accompanied by an explanation of such determination

which he shall publish and transmit to the Congress.

**(11) Penalties.—(A)** The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall violate the provisions of this section, or the rules and regulations established hereunder, shall be liable to a civil penalty of not more than \$10,000.

**(B)** The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall knowingly and willfully violate the provisions of this section or the rules and regulations established hereunder, shall be subject to a fine of not less than \$5,000 or more than \$50,000, or imprisonment for not more than five years, or both.

**(C)** Any vessel subject to the provisions of this section, which shall be in violation of this section or the rules and regulations established hereunder, shall be liable in rem and may be proceeded against in the United States district court for any district in which the vessel may be found.

**(12) Injunctive Proceedings. —** The United States district courts shall have jurisdiction for cause shown to restrain violations of this section or the rules and regulations promulgated hereunder.

**(13) Denial of Entry.—**The Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States to any vessel not in compliance with the provisions of this section or the regulations promulgated thereunder."

**Sec. 202.** Regulations previously issued under statutory provisions repealed, modified, or amended by this title shall continue in effect as though promulgated under the authority of section 4417a of the Revised Statutes of the United States (46 U.S.C. 391a), as amended by this title, until expressly abrogated, modified, or amended by the Secretary of the Department in which the Coast Guard is operating under the regulatory authority of such section 4417a as so amended. Any proceeding under such section 4417a for a violation which occurred before the effective date of this title may be initiated or continued to conclusion as though such section 4417a had not been amended hereby.

**Sec. 203.** The Secretary of the Department in which the Coast Guard is operating shall, for a period of ten years following the enactment of this title, make a report to the Congress at the beginning of each regular session, regarding his activities under this title. Such report shall include but not be limited to **(A)** a description of the rules and regulations prescribed by the Secretary **(i)** to improve vessel maneuvering and stopping ability and otherwise reduce the risks of collisions, groundings, and other accidents, **(ii)** to reduce cargo loss in the event of collisions, groundings, and other accidents, and **(iii)** to reduce damage to the marine environment from the normal operation of the vessels to which this title applies, **(B)** the progress made with respect to the adoption of international standards for the design, construction, alteration, and repair of vessels to

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which this title applies for protection of the marine environment, and (C) to the extent that the Secretary finds standards with respect to the design, construction, alteration, and repair of vessels for the purposes set forth in (A) (i), (ii), or (iii) above not possible, an explanation of the reasons therefor.

Approved July 10, 1972.

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#### **APPENDIX K**

#### **ARTICLE II, SECTION 2, CLAUSE 2 (TREATY MAKING POWER)**

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

\* \* \*

**APPENDIX L****AMENDMENT XI (SUITS AGAINST STATES)**

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

**APPENDIX M**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE  
Civil No. C-75-648-M  
(Three Judge Court)

**Order Suspending Processing of Appeals to the  
United States Court of Appeals  
for the Ninth Circuit**

ATLANTIC RICHFIELD COMPANY,  
*Plaintiff,*  
and  
SEATRAIN LINES, INCORPORATED,  
*Intervening Plaintiff,*  
vs.

DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. McEACHRAN, Whatcom County Prosecuting Attorney,

*Defendants,*

and

COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, INC., and CHRISTOPHER

T. BAYLEY, King County Prosecuting Attorney,  
*Intervening Defendants.*

Good cause appearing therefor by the motion of the State of Washington defendants, Daniel J. Evans, et al.,

IT IS HEREBY ORDERED that all further processing of the appeals to the United States Court of Appeals for the Ninth Circuit, initiated by two documents entitled "Notice of Appeal" filed with this Court by defendants and intervening defendants on October 21, 1976, and the other entitled "Notice of Appeal to the United States Court of Appeals for the Ninth Circuit" filed with this Court on November 23, 1976, and related to the Judgment and Orders dated and entered by this Court on September 23 and 24, 1976, and November 12, 1976, is suspended pending completion of an appeal to the United States Supreme Court initiated by defendants through the filing of a "Notice of Appeal to the Supreme Court of the United States" with this Court on November 19, 1976.

DATED this 1st day of December, 1976.

WALTER T. McGOVERN  
United States District Judge

**APPENDIX N**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE  
Civil No. C-75-648-M  
(Three Judge Court)

**Motion for Order Suspending Processing of Appeals  
to the United States Court of Appeals  
for the Ninth Circuit**

ATLANTIC RICHFIELD COMPANY,  
*Plaintiff,*  
and  
SEATRAIN LINES, INCORPORATED,  
*Intervening Plaintiff,*  
vs.

DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. MCEACHRAN, Whatcom County Prosecuting Attorney,

*Defendants,*

and

COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, INC., and CHRISTOPHER

**T. BAYLEY, King County Prosecuting Attorney,  
Intervening Defendants.**

Defendants Daniel J. Evans, Governor of the State of Washington; Slade Gorton, Attorney General of the State of Washington; William C. Jacobs, Chairman, and Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther, and J. Q. Paull, Members, Board of Pilotage Commissioners, move this Court for an order suspending the further processing of the appeals to the United States Court of Appeals for the Ninth Circuit, initiated by two documents, one entitled "Notice of Appeal" and filed with this Court by defendants and intervening defendants on October 21, 1976, and the other entitled "Notice of Appeal to the United States Court of Appeals for the Ninth Circuit" filed with this Court on November 19, 1976, and relating to the Judgment and Orders dated and entered by this Court on September 23 and 24, 1976 and November 12, 1976, pending completion of an appeal to the United States Supreme Court initiated by defendants through the filing of a "Notice of Appeal to the Supreme Court of the United States" with this Court on November 19, 1976.

In support of the granting of the motion, the following is set forth:

1. The aforementioned appeals to the United States Court of Appeals for the Ninth Circuit were filed by defendants as a precaution, arising from the ambiguity of statutes and case law involving appeals from three-judge courts, to insure that the defend-

ants did not forego their opportunity to obtain review of the aforementioned Judgment and Orders of this Court dated and entered on September 23 and 24, 1976 and November 12, 1976.

2. The defendants believe the Court having appellate jurisdiction, in the present posture of the final Judgment and Orders in this case, is the United States Supreme Court. A Notice of Appeal to the United States Supreme Court was filed on November 19, 1976.

3. The movant has contacted attorneys of record for each of the parties to this case, and none of these attorneys has an objection to the granting of the motion.

DATED this 23rd day of November, 1976.

CHARLES B. ROE, JR.  
Senior Assistant Attorney General

Of Attorneys for Defendants Daniel J. Evans, Slade Gorton, William C. Jacobs, Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther, and J. Q. Paull

JAN 7 1977

RODAK, JR., CLERK

IN THE

Supreme Court of the United States  
76-930

October Term, 1976

No. A-456

DANIEL J. EVANS, Governor of the State of Washington,  
*et al.*,

*Appellants.*

vs.

ATLANTIC RICHFIELD, *et al.*,

*Appellees.*

**Brief of Amicus Curiae State of California (Joined by  
the States of Alaska, Pennsylvania, Wisconsin and  
Missouri) in Support of Appellants' Jurisdictional  
Statement.**

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# IN THE Supreme Court of the United States

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No. A-456

DANIEL J. EVANS, Governor of the State of Washington,  
*et al.*,  
*Appellants,*  
*vs.*

ATLANTIC RICHFIELD, *et al.*,  
*Appellees.*

**Brief of Amicus Curiae State of California (Joined by  
the States of Alaska, Pennsylvania, Wisconsin and  
Missouri) in Support of Appellants' Jurisdictional  
Statement.**

### Interest of Amici Curiae States.

The State of California and the named states joining in this brief are vitally concerned with the District Court's ruling in this case. At stake is the historic police power authority of coastal and Great Lakes states to adopt and implement reasonable regulations for protecting coastal waters and marine environments from supertanker oil pollution. With the advent of Alaskan oil, it is now clear that the Pacific coastal states, particularly California, may assume the burden of receiving and passing inland through their coastal regions a significant portion of the nation's oil needs. In the next few years, it is expected that about 1 million

barrels *per day* of Alaskan oil will be entering California by tanker. Not only the higher volume of crude oil shipped but also the increasing size of supertankers presents a greater potential for catastrophic oil spills that will cause serious damage to California's coastal resources.

The other named states<sup>1</sup> joining in this brief are equally concerned with California that increasing volumes of crude oil transported by large tankers may have serious pollution consequences for their shoreline and coastal resources.

The world's tanker fleet is now dominated by the big ships. These supertankers will carry most of the world's oil for years to come. There is new evidence that enlarging the size of tankers considerably increases the risks of accidental oil spills.<sup>2</sup>

Faced with the reality that supertankers will be carrying the bulk of oil transported by sea, faced with the reality that Congress has taken some action to regulate oil tanker pollution (but perhaps not as much as coastal states would like to see), and faced with the reality that some accommodation must be sought between meeting the nation's oil needs and protecting coastal resources from pollution, California and the named states joining in this brief have a strong interest in being free to develop and implement innovative but reasonable tanker regulations consistent both with local needs and national interests.

Amici curiae states have no interest or desire to compete with the U.S. Coast Guard's regulations over

vessel safety design and traffic control. However, where Congress has legislated requirements for tanker safety and for protecting coastal marine environments in a way that plainly permits cooperative and complementary regulation by affected states, such states have a compelling interest in protecting and implementing their historic police powers in a way that does not conflict with federal law and regulations in this area.

#### **The Questions Are Substantial.**

##### **The Ports and Waterways Safety Act Does Not Preempt the States From Regulating Oil Tanker Operations and Traffic Routes.**

The District Court below has held that the PWSA has preempted the field of regulating oil tanker operations, traffic routes, pilotage and safety design specifications. The effect of this ruling is to nullify or preclude a wide range of existing or potential state laws regulating oil tanker operations and traffic routes. The broad wording of the District Court's ruling appears to preclude state regulation of oil tanker operations inside harbors and inland waterways. The District Court's ruling may also cast doubt on the ability of states to regulate a different type of oil tanker pollution—hydrocarbon emissions generated from oil tanker unloading operations, ballasting and purging, which are significant sources of air pollution.

This broad preemption holding conflicts with basic principles of federal preemption and the application of these principles to the area of state regulation of coastal and shoreline resources and environmental quality. This Court has consistently held that the States may supplement federal regulations in a limited field where the state has a valid interest to protect and

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<sup>1</sup>The State of Missouri, joining in this brief, is not a coastal or Great Lakes state, but is concerned about the adverse implications of the District Court's decision on federal-state relations.

<sup>2</sup>"Large Rewards Losing Appeal Against the Big Risk" in *Fairplay*, March 11, 1976 [leading international shipping weekly].

where there is no actual conflict between the state and federal laws. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Askew v. American Waterway Operators*, 411 U.S. 325 (1973); *DeCanas v. Bica*, 424 U.S. 351 (1976). Significantly, the District Court's holding indicates that the PWSA preempts the states from regulating tanker operations and traffic routes even where the Coast Guard has not acted. *Atlantic Richfield v. Evans*, ..... F.Supp. ...., Slip Opinion page 3 (1976). Related to this, the District Court's decision below precludes historic state police power authority to restrict oil tankers from operating in environmentally sensitive bays, sounds and estuaries. The District Court strains to reason that PWSA, 33 U.S.C. § 1221(3)(iv) gives the Coast Guard this exclusive control based on enabling authority to restrict tankers "under adverse or hazardous conditions." Hence, states seeking to restrict tanker operations on broader police power grounds that may extend beyond "adverse or hazardous conditions", cannot do so according to the District Court, even if the Coast Guard never actually regulates in that specific area. Clearly, this is wrong.

**Washington's Tanker Law Does Not Violate the Commerce Clause.**

Another substantial question is whether Washington's Tanker Law violates the Commerce Clause. The District Court did not decide this question although it was extensively briefed by the parties below. Appellee Atlantic Richfield Company argues that Section (3)(2) of Washington's Tanker Law violates the Commerce Clause because all oil tankers over 125,000 dwt are excluded from operating in Puget Sound. But the ban

on tankers over 125,000 dwt does not apply to remaining coastal waters in Washington state; several sites for supertanker ports exist in these coastal waters outside Puget Sound. Certainly a state has police power authority, comparable to its zoning power, to exclude supertankers from selected environmentally sensitive bays, sounds and harbors without violating the Commerce Clause.

**Conclusion.**

It is important for this Court to take jurisdiction of this case since the decision below threatens state regulation of matters legitimately within its police power, threatens existing and contemplated state laws on oil tanker operations in coastal areas not in conflict with federal law, and threatens the well-settled balance of state-federal regulations in this area. The sweeping preemption ruling of the District Court below would oust the coastal states from their historically recognized police powers over coastal and harbor water uses. The District Court's ruling, unfortunately sparse in analysis, goes too far.

Dated: January 6, 1977.

Respectfully submitted,

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NICHOLAS C. YOST,

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*Deputy Attorneys General,*

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JAN 14 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-930**

DANIEL J. EVANS, ET AL.,

*Appellants.*

v.

ATLANTIC RICHFIELD COMPANY, ET AL.,

*Appellees.*

**BRIEF OF THE STATES OF MARYLAND,  
DELAWARE, MAINE, MINNESOTA AND NEW YORK  
AMICI CURIAE IN SUPPORT OF STATEMENT  
AS TO JURISDICTION**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-930**

DANIEL J. EVANS, ET AL.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, ET AL.,

*Appellees.*

BRIEF OF THE STATES OF MARYLAND,  
DELAWARE, MAINE, MINNESOTA AND NEW YORK  
AMICI CURIAE IN SUPPORT OF STATEMENT  
AS TO JURISDICTION

**INTERESTS OF AMICI CURIAE**

**STATE OF MARYLAND**

Maryland is a water-oriented state. Fifteen of Maryland's 23 counties border on tidal water. The length of tidal shoreline in the state is 3,190 miles.

The Chesapeake Bay encompasses 1,726 square miles in Maryland in addition to 1,511 square miles in Virginia. Navigable to ocean-going ships, the Bay has two outlets to the Atlantic Ocean, one through the Chesapeake and Delaware Canal and one through its mouth.

The Chesapeake Bay is the main source of Maryland's seafood industry, an industry which annually produces fish, crabs, oysters and clams valued at more than \$19 million dockside and more than \$50 million

when processed. Maryland produces more than 50% of the nation's clams, more than 50% of the nation's striped bass, and more than 30% of the nation's oysters. The Bay also produces more than one-half of the nation's blue crabs.

Maryland's fishing industry and related food-processing industry employ approximately 13,300 people, of which well over two-thirds are on a full-time basis. Recent studies have indicated that between 200,000 and 300,000 Marylanders annually spend an estimated \$20 million on goods and services needed to engage in saltwater angling. In addition to this, Maryland's fishing fleet has been valued as of January, 1970 at \$149 million.

The productivity of the Bay is dependent on a great many factors; each contributing to the attainment of the proper amount of oxygen, salinity, and nutrients in the Bay waters. The balance is indeed fragile, for the variance of these components by an almost imperceptible degree has drastic consequences on the Bay's productivity.

Maryland is most concerned that these activities be protected. The very large amounts of oil shipped annually through the Port of Baltimore pose a constant threat to Maryland waters. For the calendar year of 1975, approximately 13 million short tons of petroleum and petroleum products were shipped to and from Baltimore harbor. Some 4,033 ships used the port during 1975. Few states can claim so vital a maritime operation. The benefits that such a port bring to the people of Maryland must be balanced against the special dangers and responsibilities inherent in moving these very large amounts of oil and in directing Baltimore's increasingly busy facility.

The threat of debilitation of the Chesapeake Bay ecosystem by oil spills is an acknowledged risk to which

Maryland must respond. The factors to be considered and their ramifications are uniquely within the interests and prerogatives of Maryland. The issue to be resolved in this litigation, however, i.e., how far the State may legislate to respond to these problems, is common to all other estuarine port areas in the states of this country.

#### STATE OF DELAWARE

The coastal zone of Delaware is a valuable and, in many respects, irreplaceable resource of the State, region, and nation. Delaware has a salt-water shoreline approximately 260 miles long. All three counties border the Delaware Bay. No part of the State is more than about eight miles from tidewater. Because of Delaware's size and location, there is a continuous interaction of land and tidal water bodies influencing nearly all of the State.

The total shoreline along the Atlantic Ocean, Delaware Bay and Delaware River in the State is 115 miles long, of which 97 miles is considered suitable for recreation. Twenty-one tributaries in the Delaware River estuary provide waterways for recreation, in addition to the 15,500 acres of water in the Rehoboth, Indian River and Little Assawoman Bays.

The coastal bays of Delaware are part of a system of shallow-water estuaries which are the nursery and rearing grounds of most species of finfish important to both commercial and sport fisheries along the East Coast of the United States. About two-thirds of fish landed by American fishermen spend a vital part of their lives in an estuary.

Seafood landings in Delaware in 1975 were reported by the National Marine Fishery Service to be 797,200 pounds of finfish and 6,258,000 pounds of shellfish. The dockside value of the 1976 commercial shellfish industry was reported by the State Department of Natural

Resources and Environmental Control as \$1.64 million. The 1976 recreational fishing industry was valued at greater than \$10 million. The coastal resources-independent tourism industry is likewise a multi-million dollar business. In addition, State parks in Delaware's coastal zone accommodated 1,629,486 visitors in fiscal year 1976.

Estuaries and coastal wetlands are the most bountiful, productive areas in the world. They are also the most sensitive to oil spill effects. The Tanker Advisory Center in New York reports 60 million gallons of oil were spilled worldwide by oil tankers in 1976. Spilled oil can damage marine and marsh life in three ways:

1. By direct contact — crude oil and more volatile products coat marine organisms, birds, and animals. Certain animals will be suffocated and birds, when preening, swallow oil and often die.

2. Long term effects of spilled oil include the existence of oil in marine sediments where it becomes accessible to the marine food chain. Through the food chain petroleum derived hydrocarbons may continue to accumulate in marine organisms which are consumed by humans.

3. The cleanup of spilled petroleum can be damaging to marine and tidal marsh life. This results from the use of detergents and emulsifiers and also from personnel and equipment used in cleanup operations.

The volume of oil transported by tankers endangering Delaware's interests is enormous. The Army Corps of Engineers reports that 43,297,974 short tons of crude petroleum were transported by tankers up the Delaware Bay in 1975. Three hundred fifteen thousand gallons of this gigantic amount spilled into the Delaware River in January 1975 when the tanker CORINTHOS exploded, killing several people and thousands of waterfowl. On December 27, 1976, the Liberian tanker OLYMPIC GAMES spewed another 133,000 gallons of oil in the

Delaware River, killing more waterfowl. A few days later another oil tanker ran aground in the Delaware River, threatening further damage to Delaware's interests.

Unfortunately, the risk of oil tanker spills is much greater within state jurisdictional waters than on the high seas. Shallower water and more dense tanker traffic inevitably raise the odds of a catastrophic spill. Delaware's dependence on a clean Delaware River and Bay mandates that the State respond to the grave threat posed by tanker operations in these waters.

#### STATE OF MAINE

Maine has approximately 3,000 miles of coastline and 1,500 coastal islands. Eleven of Maine's 16 counties border on tidal water.

A substantial portion of the Maine economy is dependent upon the ocean resources. The Maine fishing and fish processing industries employ in excess of 15,000 people in fishing — processing and wholesaling. Maine lands approximately 150 million pounds of fish and shellfish annually, at a landed value in excess of \$31 million. The principal species of commercial fish are ocean perch, herring, cod, haddock, hake, pollack, flounder, shad, whiting, mackerel, tuna, alewives and some smelt and marine worms. The principal commercial shellfish are lobster, scallops, crabs, clams, mussels and shrimp. Maine carries on substantial regulatory and research programs for all of these species.

In addition to the direct economic value of the fisheries, the coastal environment is a noted tourist haven, annually attracting millions of visitors. Acadia National Park, located in Penobscot Bay in central Maine, is used by more than two and a half million persons annually. The economic benefit to the State from tourism is an important source of income to coastal Maine communities. Such areas are attractive

because they provide an opportunity to visit and view pristine coastal areas. In addition, the coast provides an important resource to the inhabitants of the State as a place of recreation and solace, and, in that respect alone, is of immeasurable value to the State. Maine has two major ports for oceangoing tankers. Tankers transship crude oil and refined products at Portland and Searsport. Major refining facilities have been proposed for Searsport, Portland, and Sanford, all of which would be dependent on foreign oil for sources of supply. A major oil facility is currently proposed for Eastport, Maine. Portland alone is one of the major crude oil facilities in the United States, and is the largest crude oil terminal on the East Coast. Crude oil received in Portland is exported to Montreal, Canada to refineries there.

The dangers resulting from the movement of oil in both domestic and foreign vessels poses a threat to this vital state resource. In the recent past large and small spills have damaged marine resources and public and private property. A recent large spill in Portland from a foreign-owned vessel damaged shellfishing areas in the southern coast of Maine, and caused extensive damage to the Maine coastline.

In response to this danger, Maine has enacted various statutes authorizing state agencies to regulate oil vessels, both foreign and domestic, and onshore facilities. These statutes and regulations were enacted because of the Maine legislature's conclusion that national statutes and standards were inadequate to protect Maine's resources, were drafted with considerations in mind other than protection of the Maine coastline and fisheries resources, and were generally not sufficiently rigorous to ensure to Maine the kind of protection necessary for this viable resource.

#### STATE OF MINNESOTA

Minnesota is an inland state which is renowned for its water resources. For purposes of this litigation, the most significant water resources of Minnesota are Lake Superior and the Mississippi River. Lake Superior is the largest and purest freshwater body on this continent, and the Mississippi River is both a major economic and recreational waterway.

Oil is currently shipped from ports on Lake Superior and the Mississippi River. Dramatic increases in the transshipment of oil are anticipated to occur in the near future, particularly from the port of Duluth on Lake Superior. This increase in traffic will bring with it inevitable oil spillages.

In March, 1976, Minnesota convened a conference of the Great Lakes States to discuss the technological and legal methods of controlling spillage from oil transshipment. Among the recommendations from that conference was the passage of State legislation relating to controls on oil spillage.

The result below in the instant case casts doubt on Minnesota's authority to effectively implement such legislation. Thus, it is imperative that this Court review that decision to determine the appropriate federal-state relationship and responsibility in this vital area. Minnesota's interest in controlling such environmental effects has been demonstrated in the courts on many prior occasions. Among others, see *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975); *Minnesota v. EPA*, 512 F.2d 913 (8th Cir. 1975); *Minnesota v. Hoffman*, \_\_\_ F.2d \_\_\_, 9 ERC 1353 (8th Cir. 1976).

#### STATE OF NEW YORK

New York's interest in protecting its two thousand-mile coastline, beaches, tidal wetlands and harbors from oil spills is great, and legislation to this effect has

been introduced in the legislature. New York's commercial ocean fish catch in 1975 amounted to 37.7 million pounds valued at \$86 million, employing nearly 10,000 commercial fishermen. Sport fishermen in New York's marine waters are estimated at 2.3 million persons, bringing in vast revenues to a wide variety of industries and services. As just one instance, 984,000 boaters based in New York used our Atlantic coastal waters as of 1970 — a number undoubtedly higher in more recent years.

The shellfish catch in New York, including Long Island's clams and oysters, is of equal commercial importance, and not just to New Yorkers. An oil spill in the waters where these mollusks breed and live would wreak incalculable economic as well as environmental harm.

In addition, New York has 600 miles of beaches on its marine shoreline, including all of the recreational beaches heavily used by New York City's 8 million residents. An oil spill disabling these beaches during the summer would be catastrophic to hundreds of thousands of our citizens, including urban residents of low and moderate incomes to whom access to other recreational facilities is scant.

The Interior Department's offshore oil drilling program, as well as the presence of numerous tankers in New York waters, renders legislation to protect our marine and coastal resources of vital importance. Finally, the port of New York, the Nation's busiest and largest, on which the livelihood of tens of thousands directly depends, and through which millions of tons of imports and exports are shipped, would be jeopardized by a major oil spill. All of these elements combine to make this litigation of crucial significance for New York, its businesses and their employees, and the well-being of its citizens.

## **OPINION BELOW**

The opinion below was entered by a Three-Judge Court for the Western District of Washington on September 24, 1976. Copies of the Opinion and Final Order are attached hereto as Appendix A.

## **JURISDICTION**

A Final Order of the Three-Judge District Court was entered on September 24, 1976. The jurisdiction of the Supreme Court to review this decision by appeal is pursuant to 28 USC §1253.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause, Article VI, Clause 2; the Commerce Clause, Article I, Section 8, Clause 3; and the Tenth Amendment. The Statutory provisions are 33 USC §1221, §1222, 46 USC 391(a) (the Ports and Waterways Safety Act), and Revised Washington Code §88.16.170 *et seq.* (the Washington Tanker Law). Copy of the Washington Tanker Law is attached hereto as Appendix B.

## **QUESTIONS PRESENTED**

1. Whether the Ports and Waterways Safety Act (codified at 33 USC 1221, 1222 and 46 USC 391(a)) preempts the states from exercising their police powers to protect their marine resources from irreparable damage caused by oil pollution from vessels.
2. Whether the maritime jurisdiction of the federal government preempts the proper exercise of the state police power to protect the state's marine resources from irreparable damage caused by oil pollution from vessels.

3. Whether the Interstate and Foreign Commerce Clause of the United States Constitution precludes the states from protecting the health, life and safety of their citizens and marine resources from the dangers of oil pollution from vessels.

### STATEMENT

The States of Maryland, Delaware, Maine, Minnesota and New York adopt the Statement of the Case contained within the Brief of Appellant.

### THE QUESTIONS ARE SUBSTANTIAL

#### I.

#### WHETHER THE PORTS AND WATERWAYS SAFETY ACT OF 1972 PREEMPTS THE STATES FROM ENACTING LEGISLATION TO PREVENT OIL SPILLS FROM OIL TANKERS ENTERING STATE TERRITORIAL WATERS.

The Ports and Waterways Safety Act, 33 USC §1221 *et seq.* (PSWA) does not expressly preempt all areas encompassed within the Act. The language of the Act specifically provides a state role by authorizing the states to adopt "higher safety equipment requirements or safety standards" relative to installations of port "structures" and higher safety standards regulating operation of oil tankers to safeguard the marine environment from oil pollution.

The District Court, without addressing itself to the lack of the express congressional statement on preemption, concluded that the PWSA preempted Chapter 125, Laws of Washington, 1975, 1st Extra Session, codified as R.C.W. §88.16.170 *et seq.* (the Washington Tanker Law). It determined that the PWSA established a "comprehensive federal scheme for regulating the operations, traffic routes, pilotage and safety specifications of tankers". Appendix A. No authorities are recited by the District Court to support its conclusions. The effect of the Court's decision is to subject fragile

state resources, which historically were protected by the exercise of the police power, to the whims and programs of distant federal bureaucrats, thereby at least for the present, exposing the states' environment and economics to the perils of oil spills. See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

The District Court failed to recognize that exercise of state police power is not to be deemed preempted, absent an "unambiguous congressional mandate to that effect." *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963). Similar warnings against federal preemption have been announced by this Honorable Court in *Reid v. Colorado*, 187 U.S. 137 (1902); *Napier v. Atlantic Coastline R. Co.*, 272 U.S. 605, 611 (1926); *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 780 (1947); *Schwartz v. Texas*, 344 U.S. 199 (1952).

In *Bethlehem Steel Co. v. New York Labor Relations Board*, *supra*, at 773, this Court established tests for analysis of state legislation where "Congress has outlined its policy in general and inclusive terms and delegated determination of their specific application to an administrative tribunal." State legislation occupying the same field the federal law encompasses may be upheld in the *interim*, pending the adoption by federal authorities of the comprehensive protective rules and regulations required to carry out the federal scheme. *Bethlehem Steel*, *supra* at 773, 774; *Northwestern Bell Telephone Co. v. Nebraska State Comm'n*, 297 U.S. 471 (1936); *Welch Co. v. New Hampshire*, 306 U.S. 79 (1939). This test is applicable to the case at bar.

The tug-escort provision of the Washington Tanker Law, Section 190 of Chapter 88.16, is a basic alternative to greater tanker safety design and equipment features required elsewhere within that provision. The District Court, referencing 33 USCA §1221(3)(iv), concluded that

the PWSA preempts the tug-escort provisions of the Washington Tanker Law, even though this section does not directly refer to tug-escort. While it may be argued that tug-escort is authorized under that Section, it appears that the Coast Guard is only in the preliminary stage of promulgating minimum standards for tug assistance in confined waters. 41 Fed. Reg. 18770 (May 6, 1976). Until the Coast Guard standards are promulgated, Washington's tug-escort provisions should fill the gap in order to reduce the chances of oil spills in Puget Sound. The same is true for other cases where it is determined that federal regulation has not yet been adopted.

The mere adoption of federal regulations does not in and of itself void "interim" state regulation. This Court, in *Bethlehem Steel, supra*, further stated at page 774 that it is only "when the comprehensive [federal] regulations effectively governing the subject matter of the statute . . ." have been adopted that state regulation is invalid. Citing *Napier v. Atlantic Coastline R. Co., supra*. (Emphasis added) Oil pollution regulation is an area where some governmental authority must at all times have effective controls. The recent massive oil spills and groundings offshore Massachusetts and in the Delaware River and in Los Angeles Harbor attest to the ineffectiveness of existing Coast Guard regulation of oil-laden tankers in coastal waters. Shortly after these tragic occurrences, the federal authorities conceded that their regulatory scheme was ineffective. Until it is shown that effective federal regulation has been adopted incorporating the Washington Tanker Law provisions, the state law should stand.

Additionally, it may be asserted that there is no real conflict between the provisions of the PWSA and the Washington Tanker Law. The Washington Tanker Law is aimed at preventing oil pollution from tankers. While the PWSA is couched in structural safety and environ-

mental terms, as stated by the District Court, there are no assurances that the environmental interests will be given greater or equal application as the structural matters in the federal regulatory scheme. It is now settled that prevention of oil pollution is a matter for the legitimate exercise of the state police power. *Askew v. American Waterways Operators, Inc., supra*. See also *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). The Washington Tanker Law is an environmental measure within the scope of shared federal and state regulation. 33 USC §1517(k); 33 USCA Section 1370.

## II.

### WHETHER THE ADMIRALTY AND MARITIME JURISDICTION OF THE FEDERAL GOVERNMENT PREEMPTS THE PROPER EXERCISE OF THE STATE POLICE POWERS DESIGNED TO PROTECT THE STATE'S NATURAL RESOURCES FROM IRREPARABLE DAMAGE CAUSED BY OIL POLLUTION.

Congress, through the growing network of federal oil spill prevention and control legislation, has made clear its intention that the States shall participate in the overall scheme. The District Court's decision does not clarify the relationship of the oil spill prevention provisions of the PWSA to the Deepwater Ports Act of 1974, codified at 33 U.S.C.A. §1501, *et seq.*; the Federal Water Pollution Control Act of 1972, codified at 33 U.S.C.A. §1251, *et seq.* and the Coastal Zone Management Act of 1972 codified at 16 U.S.C.A. §1405, *et seq.* It is inconsistent for Congress to establish a comprehensive oil spill prevention program with clear opportunities for state participation on one hand, only to preempt the States from participation on the other.

Decisions of this Court have sustained the exercise of the state police power in many areas of maritime activities concurrently with the federal government. *Huron Portland Cement Co. v. Detroit, supra*, at 442.

Starting with *Cooley v. Board of Port Wardens*, 53 U.S. 299 (1951), (state pilots); *Kelly v. Washington*, 302 U.S. 1 (1937), (local inspection of motor-driven tugs engaged in interstate commerce); *Huron Portland Cement Co. v. Detroit*, *supra*, (application of municipal air pollution standards to vessels engaged in interstate and foreign commerce); and ending with *Askew v. American Waterways Operators, Inc.*, *supra*, (sanctioning state regulation of any "requirement or liability" to prevent and mitigate the irreparable damages resulting from oil pollution), this Honorable Court has recognized the increasing State interest and role in protecting the health, safety and welfare of their citizens and natural resources. As a consequence, State participation in areas of the maritime law has been broadened. The District Court's decision implies that this line of cases has no application to the present situation. Only this Court can resolve the matter.

### III.

#### WHETHER THE INTERSTATE AND FOREIGN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION PRECLUDES THE STATES FROM PROTECTING THE HEALTH, LIFE AND SAFETY OF THEIR CITIZENS AND NATURAL RESOURCES FROM THE DANGERS OF OIL POLLUTION FROM VESSELS.

The "commerce" issue was not addressed by the Court below. Certain incursions which have traditionally been labeled as "burdens" upon interstate and foreign commerce have been sustained in order to allow the respective states to exercise their police powers. *Cooley v. Board of Port Wardens*, *supra*; *Huron Portland Cement Co. v. Detroit*, *supra*; *Cities Service Gas Co. v. Peerless Co.*, 340 U.S. 179 (1950); *Skiriotes v. Florida*, 313 U.S. 69 (1941); *American Can v. Oregon Liquor Control Comm'n*, 517 P.2d 691 (1973); *Procter and Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975); *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

The exercise of the state police powers must continuously expand to meet the larger and more serious exigencies. See *Berman v. Parker*, 348 U.S. 26, 32 (1954); *Potomac Sand & Gravel Co. v. Governor*, 266 Md. 358, 371 (1972). When the exercise of the police powers burdens interstate and foreign commerce, then it must be determined if this burden is justifiable. The cost of tug escort contemplated by Section 88.16.190 of the Washington Tanker Law is such a minuscule portion of the total cost of tanker transport of oil (paragraph 78 of the Pretrial Order), that it is commonly known in the transport industry as "cheap insurance". (Maryland-Maine Amici Curiae Brief in the record at 20.) Similar analyses can be made of the double bottom, and equipment provisions of the Washington Tanker Law. These costs are weighed against the costs to marine resources of oil spills. If it is determined that the Washington Tanker Law imposes a burden on interstate and foreign commerce, there are adequate facts set forth in the Pretrial Order to enable this Court to determine if the burden exceeds permissible limits.

## CONCLUSION

The issues presented to this Court transcend their application to the parties involved. If the District Court opinion stands, it would prohibit coastal states from enacting legislation reducing serious risks posed by the increasing oil tanker trade. The states cannot be expected to refrain from action while their marine resources are being destroyed or threatened by massive oil pollution from tankers, pending implementation of an effective federal program.

We respectfully request that this Court note probable jurisdiction in this case.

Respectfully submitted,

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## APPENDIX A

### OPINION

*United States District Court  
Western District of Washington  
at Seattle*

No. C 75-648M

*Atlantic Richfield Company, Plaintiff,  
and  
Seatrain Lines, Incorporated,  
Intervening Plaintiff,  
v.*

*Daniel J. Evans, Governor of the State of Washington;  
Slade Gorton, Attorney General of the State of  
Washington; William C. Jacobs, Chairman, and  
Harry A. Greenwood, Benjamin W. Joyce, Philip H.  
Luther, and J. Q. Paull, Members, Board of Pilotage  
Commissioners; and David S. McEachran, Whatcom  
County Prosecuting Attorney,*

*Defendants,*

*and*

*Coalition against oil pollution, National Wildlife  
Federation, Sierra Club, Environmental Defense  
Fund, Inc., and Christopher T. Bayley, King County  
Prosecuting Attorney,*

*Intervening Defendants.*

*Before: Goodwin, Circuit Judge, and McGovern and  
East, District Judges.*

**PER CURIAM.**

Atlantic Richfield Company (Arco) and Seatrain Lines, Inc., sued named officials of the State of Washington to enjoin enforcement of a 1975 Washington law regulating oil tankers operating in the Puget Sound. Jurisdiction is conferred by 28 U.S.C. §§1331 and 1337, and this three-judge court was convened in accordance with 28 U.S.C. §§2281, 2284.<sup>1</sup>

At the outset, the State of Washington challenges our jurisdiction, asserting sovereign immunity under the Eleventh Amendment. Aware of the rule in *Ex Parte Young*, 209 U.S. 123 (1908), the State invites us to "overrule" it, or at least to restrict the scope of cases falling within the *Young* "exception" to the Eleventh Amendment. The invitation is attractively and persuasively argued, but we decline it. The Supreme Court, if it chooses to do so,<sup>2</sup> will have ample opportunity to reconsider *Young*.

The challenged statutes are found in Chapter 125, Laws of Washington, 1975, 1st Extra Sess., codified at R.C.W. §§88.16.170, *et seq.* (the Tanker Law). The Tanker Law regulates oil tankers operating in Puget Sound.<sup>3</sup> Section 2 of the Tanker Law requires any tanker in excess of 50,000 deadweight tons (dwt) to employ a locally licensed pilot. Section 3(1) absolutely prohibits "supertankers", that is, those larger than 125,000 dwt. And §3(2) prescribes some minimum design specifications (shaft horsepower, twin screws, double bottoms, and twin radars) for tankers between 40,000 and 125,000 dwt. A proviso in §3(2) waives these design specifications for tankers accompanied by an appropriate complement of tugboats.

Arco and Seatrain contend that the state's restrictions are preempted by federal regulation in the field.

<sup>1</sup> The Three-Judge Court Act was modified by \_\_\_ Stat. \_\_\_ (1976). Section 7 of that modification specifically denied any retroactive application of the change. Since this case was heard before the change, our jurisdiction is determined by the former law.

<sup>2</sup> See 28 U.S.C. § 1253 (1970).

<sup>3</sup> By "Puget Sound" we mean those waters east of a line extending from Discovery Island Light south to New Dungeness Light. R.C.W. § 88.16.190.

are violative of the commerce clause, and invade the foreign affairs powers of the United States.

We are persuaded that federal law has preempted the field. Title I of the Ports and Waterways Safety Act of 1972 (the PWSA), 33 U.S.C. §§1221 *et seq.*, establishes a comprehensive federal scheme for regulating the operations, traffic routes, pilotage, and safety design specifications of tankers. Under the PWSA, the Coast Guard can create traffic-control systems for Puget Sound, and it has done so. 33 C.F.R. Part 161, Subpart B. The PWSA gives the Coast Guard authority to restrict and even exclude tankers from Puget Sound under adverse or hazardous conditions. 33 U.S.C. §1221(3)(iv).

Title II of the PWSA amended the Tank Vessel Act of 1936, 46 U.S.C. §§391a. It empowered the Coast Guard to regulate design, construction, and maintenance of tankers operating in United States waters. See proposed regulations, 41 Fed. Reg. 15859 (April 15, 1976).

The purpose of the original Tank Vessel Act, and of Title II of PWSA, was to establish a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions under which they would be permitted to operate. Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA. The PWSA has preempted § 3(2) of Washington's Tanker Law.

Washington asserts that the minimum design specifications required by § 3(2) of the Tanker Law were not preempted, because they can be avoided if the tanker has a tugboat escort. Congress has given the Coast Guard authority to require tugboat escorts in Puget Sound under hazardous conditions. 33 U.S.C. § 1221(3)(iv). And the Coast Guard has considered doing this. Department of Transportation, Coast Guard, Final Environmental Impact Statement [on the] Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade 71 (August 15, 1975). We believe that the tugboat-escort provision of the Tanker Law has also been preempted by the federal law.

Arco and Seatrain also argue that § 2 of Washington's Tanker Law (requiring a local pilot on all tankers larger than 50,000 dwt) has been preempted. Insofar as the Tanker Law prohibits a tanker "enrolled in the coastwise trade" from navigating Puget Sound unless it has a local pilot, the statute is void; it conflicts with clear federal law on that subject. 46 U.S.C. §§ 215, 364 (1970).

Recognizing the difficulty of its position, the State of Washington argues that its Tanker Law is part of a comprehensive coastal management plan, and that it should be upheld on that ground. "Cooperative federalism" has been the congressional policy for designing a United States environmental policy. The Congress funded and encouraged the coastal states to design comprehensive and forward-looking coastal management plans. 16 U.S.C. §§ 1451 *et seq.* Congress has invoked "cooperative federalism" — or at least some state involvement — in virtually all of its water-related regulatory programs: The Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.*; the Clean Air Act, 42 U.S.C. § 1857; the Estuarine Act of 1968, 16 U.S.C. §§ 1221 *et seq.*; and the Deepwater Ports Act of 1974, 33 U.S.C. §§ 1501 *et seq.*

Congress has used "cooperative federalism" in forming environmental regulations. But the State of Washington fails to note that in those statutes Congress explicitly invited state participation in various phases of the formation of the regulatory scheme. The PWSA, on the other hand, does not invite such state participation; it does not share regulatory authority over oil tankers with the states.

Supporting its position, Washington cites *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), and *Huron Portland Cement v. City of Detroit*, 362 U.S. 440 (1960). The *Askew* case upheld Florida's law imposing strict liability in tort on oil spillers. The Court held that the state regulatory scheme did not conflict with federal regulation of oil tankers. But that Florida statute did not attempt to regulate the design of the tanker or tanker operations, which were already federally regulated. The *Askew* case involved the Federal Water Quality Control Act, not the PWSA, and

the holding of the Court was in part reflective of the congressional policy of "cooperative federalism" in the Federal Water Quality Control Act.

In the *Huron Portland Cement* case, a city's smoke-control ordinance was applied against a vessel engaged in interstate commerce. The Court observed that the environmental purpose of Detroit's ordinance was not preempted by federal safety inspection regulations. There was "no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance." 362 U.S. at 446. Since the PWSA introduced environmental considerations into the federal tanker regulations,<sup>4</sup> the State of Washington cannot say that there is "no overlap" between the state and federal laws.

Finally, the State of Washington asserts that the Commerce Department's approval of its coastal management plan (to which the Tanker Law is related) somehow waives federal preemption of the area. The Secretary of Commerce can approve a state's coastal management plan (thereby making it eligible for federal funding) only if "the views of Federal agencies principally affected by such program have been adequately considered." 16 U.S.C. § 1456(b) (1970). The Secretary may or may not have "considered" the views of the Coast Guard. The Secretary may or may not have noticed the preemptive effect of the PWSA on Washington's Tanker Law. That is not before us. We cannot read the Secretary's approval of a coastal management plan, to which the Tanker Law is only collaterally related, as foreclosing our inquiry into the federal preemption of oil tanker regulation.

Finally, the state and the other states filing amici briefs have argued with some conviction that a state's officials, responsible to its voters, are better able to protect the state's shoreline environment than is the Commandant of the Coast Guard, headquartered on the

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<sup>4</sup> One of the primary reasons for the passage of the Ports and Waterways Safety Act was concern over the environment. The introductory clause of Title I states that the purpose is "to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage." 33 U.S.C. § 1221.

other side of the continent. This argument presents legislative, rather than judicial, policy considerations.

Because the Washington Tanker Law conflicts with federal law preempting the same subject matter, the state law is void. The plaintiffs have asserted a number of other grounds for declaring the statute void. It is unnecessary to reach these other points.

It is likewise unnecessary to grant an injunction. It is presumed that the responsible officials of the State of Washington will not undertake to enforce the statute pending such further appeals as may be taken. The clerk will enter judgment.

Neither party shall have costs.

ALFRED T. GOODWIN,  
United States Circuit Judge  
WALTER T. McGOVERN,  
United States District Judge  
WILLIAM G. EAST,  
United States District Judge.

## ORDER

*United States District Court  
Western District of Washington*

No. C75-648M

*Atlantic Richfield Company,* Plaintiff,  
*and*

*Seatrain Lines, Incorporated,*  
*Intervening Plaintiff,*  
*v.*

*Daniel J. Evans, Governor of the State of Washington;*  
*Slade Gorton, Attorney General of the State of*  
*Washington; William C. Jacobs, Chairman, and*  
*Harry A. Greenwood, Benjamin W. Joyce, Philip H.*  
*Luther, and J. Q. Paull, Members, Board of Pilotage*  
*Commissioners; and David S. McEachran, Whatcom*  
*County Prosecuting Attorney,*

Defendants,

*and*

*Coalition against Oil Pollution, National Wildlife*  
*Federation, Sierra Club, Environmental Defense*  
*Fund, Inc., and Christopher T. Bayley, King County*  
*Prosecuting Attorney,*

Intervening Defendants.

THIS MATTER came before the undersigned, one of the three judges empanelled to hear and determine the above entitled cause, in accordance with Title 28 U.S.C. §§ 2281 and 2284 and in furtherance of the unanimous opinion of the said three judges which has now been filed herein, it is hereby

ORDERED, ADJUDGED and DECREED that Chapter 125, Laws of Washington, 1975, 1st Extra Session, codified at R.C.W. §§ 88.16.170, *et seq.* (The Tanker Law) be and the same is hereby declared null and void and of no force and effect. It is further

ORDERED that the application of the plaintiff for an order enjoining the responsible officials of the State of Washington from enforcing the said statute pending any appeal of this matter be and the same is hereby denied; and it is further

ORDERED that no party to the cause shall recover costs.

DATED this 23rd day of September 1976.

WALTER T. McGOVERN,  
Chief United States  
District Judge.

## APPENDIX B

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### CHAPTER 125

[Substitute House Bill No. 527]

### OIL TANKER TRANSPORTATION ON PUGET SOUND AND ADJACENT WATERS

AN ACT Relating to water pollution from petroleum spills; and adding new sections to chapter 88.16 RCW.

Be it enacted by the Legislature of the State of Washington:

**NEW SECTION.** Section 1. There is added to chapter 88.16 RCW a new section to read as follows:

Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.

The legislature also recognizes Puget Sound and adjacent waters are a relatively confined salt water environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.

The legislature further recognizes that certain areas of Puget Sound and adjacent waters have limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.

For these reasons, it is important that large oil tankers be piloted by highly skilled persons who are familiar with local waters and that such tankers have sufficient capability for rapid maneuvering responses.

It is therefore the intent and purpose of sections 2 and 3 of this 1975 act to decrease the likelihood of oil spills on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ Washington state licensed pilots and, if lacking certain safety and

maneuvering capability requirements, to be escorted by a tug or tugs while navigating on certain areas of Puget Sound and adjacent waters.

**NEW SECTION.** Sec. 2. There is added to chapter 88.16 RCW a new section to read as follows:

Notwithstanding the provisions of RCW 88.16.070, any oil tanker, whether enrolled or registered, of fifty thousand deadweight tons or greater, shall be required to take a Washington state licensed pilot while navigating Puget Sound and adjacent waters and shall be liable for and pay pilotage rates pursuant to RCW 88.16.030 as now or hereafter amended.

**NEW SECTION.** Sec. 3. There is added to chapter 88.16 RCW a new section to read as follows:

(1) Any oil tanker, whether enrolled or registered, of greater than one hundred and twenty-five thousand deadweight tons shall be prohibited from proceeding beyond a point east of a line extending from Discovery Island light south to New Dungeness light.

(2) An oil tanker, whether enrolled or registered, of forty to one hundred and twenty-five thousand deadweight tons may proceed beyond the points enumerated in subsection (1) if such tanker possesses all of the following standard safety features:

(a) Shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons; and

(b) Twin screws; and

(c) Double bottoms, underneath all oil and liquid cargo compartments; and

(d) Two radars in working order and operating, one of which must be collision avoidance radar; and

(e) Such other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners:

**PROVIDED,** That, if such forty to one hundred and twenty-five thousand deadweight ton tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker, subsection (2) of this section shall not apply: **PROVIDED FURTHER,**

That additional tug shaft horsepower equivalencies may be required under certain conditions as established by rule and regulation of the Washington utilities and transportation commission pursuant to chapter 34.04 RCW: **PROVIDED FURTHER,** That a tanker of less than forty thousand deadweight tons is not subject to the provisions of this act.

**NEW SECTION.** Sec. 4. There is added to chapter 88.16 RCW a new section to read as follows:

*The Washington utilities and transportation commission is authorized to make rules and regulations necessary to implement the provisions of this act.*

**NEW SECTION.** Sec. 5. The House and Senate Transportation and Utilities Committees are authorized and directed to study the feasibility, benefits, and disadvantages of requiring similar pilot and tug assistance for vessels carrying other potentially hazardous materials and to submit their findings and recommendations prior to the 45th session of the Washington legislature in January, 1977. Such study shall also include a report on the feasibility, benefits and disadvantages of requiring vessels under tug escort to observe a speed limit, and such study shall include a discussion of the impact of a speed limit on the maneuverability of the vessel, the effectiveness of the tug escort and other legal and technical considerations material and relevant to the required study. Such study shall also include an evaluation and recommendations as to whether there should be a transfer of all duties and responsibilities of the board of pilotage commissioners to the Washington utilities and transportation commission or other state agency, and alternate methods for establishing fair and equitable rates for tug escort and pilot transfer.

**NEW SECTION.** Sec. 6. If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

*NEW SECTION. Sec. 7. The provisions of this 1975 act shall expire on June 30, 1978.*

Passed the House May 21, 1975.

Passed the Senate May 9, 1975.

Approved by the Governor May 29, 1975, with the exception of sections 4 and 7 which are vetoed.

Filed in Office of Secretary of State May 29, 1975.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith without my approval as to two sections Substitute House Bill No. 527 entitled:

"AN ACT Relating to water pollution from petroleum spills."

This bill provides, among other things, safety standards for oil tankers and other precautionary measures for prevention of major oil spills in Puget Sound and adjacent waters.

Section 4 of the bill authorizes the Utilities and Transportation Commission to implement the provisions of the act by rules and regulations. I am puzzled over this delegation of major responsibility to the commission, which has had no previous experience or expertise in the area. Nor is there funding provided which might allow the commission to do a creditable job in this new field of responsibility. Elsewhere in the bill a study is authorized on the desirability of transferring the duties and responsibilities of the Board of Pilotage Commissioners to the Utilities and Transportation Commission or any other appropriate state agency. Until there are findings determined in such study which confirm the need to assign the responsibility of implementing and enforcing the provisions of this act to the commission, I am not willing to allow a situation to exist where separate agencies in state government have substantially overlapping duties in this area of increasing importance without clear direction from the Legislature.

Section 7 provides an expiration date for the act of June 30, 1978. Few would disagree that this state must soon decide and act on long range solutions to the problems created by the transportation of oil in massive quantities in Puget Sound waters. By passing this bill, the Legislature has decided that at least in the near future, oil tankers exceeding 125,000 deadweight tons should not be permitted to enter these waters. The study provided in section 5 may well offer some additional alternatives. The expiration date, however, rather than encouraging all parties to develop sound long range solutions, would instead discourage such efforts. This state could, conceivably, find itself in the second half of 1978 faced with unprecedented super-tanker traffic in Puget Sound waters with all the attendant hazards but without any capability to prevent or reduce the risks of oil spills likely to produce catastrophic and permanent damage to the unique environment of the area. The expiration date would also leave the oil industry and others affected in an untenable state of uncertainty over permissible and impermissible activities in the transportation of oil into this area. Neither public nor private interests would be benefited by such uncertainty.

For the foregoing reasons, I have determined to veto sections 4 and 7 of the bill. With the exception of these sections, the remainder of the bill is approved."

Supreme Court, U.S.

FILED

MAY 13 1977

MICHAEL RODAK, JR., CLERK

## APPENDIX

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# Supreme Court of the United States OCTOBER TERM, 1976

No. 76-930

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DIXY LEE RAY, *et al.*,

*Appellants,*

—v.—

ATLANTIC RICHFIELD COMPANY, *et al.*,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
(THREE JUDGE COURT)

JAN 1977

FILED

PROBABLE JURISDICTION NOTED FEBRUARY 28, 1977

**APPENDIX**

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**Supreme Court of the United States**  
**OCTOBER TERM, 1976**

**No. 76-930**

---

**DIXY LEE RAY, et al.,**  
*Appellants,*  
—v.—  
**ATLANTIC RICHFIELD COMPANY, et al.,**  
*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
(THREE-JUDGE COURT)

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FILED NOVEMBER 19, 1976  
PROBABLE JURISDICTION NOTED FEBRUARY 28, 1977

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WESTERN DISTRICT OF WASHINGTON  
(THREE-JUDGE COURT)**

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE-JUDGE COURT**

<b>PLAINTIFFS</b>	<b>ONMENTAL FUND, INC.,</b>	<b>DEFENSE</b>
ATLANTIC RICHFIELD COMPANY	<i>Intervenor Defendants</i>	
SEATRAIN LINES, INC.,		
<i>Intervenor Plaintiff</i>		

<b>YOUNG LAWYERS SECTION, KING CO. BAR ASSOCIATION,</b>	<b>KING CO. PROSECUTOR,</b>	<b>CAUSE</b>
<i>Amicus Curiae Plaintiff</i>	<i>Intervenor or Defendant</i>	
UNITED STATES,		
<i>Amicus Curiae Plaintiff</i>		

<b>DEFENDANTS</b>	<b>STATE OF MARYLAND,</b>	<b>Amicus Curiae</b>
EVANS, DANIEL J., Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. MC EACHRAN, Whatcom County Prosecutor		
and		
COALITION AGAINST OIL POLLUTION, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, and ENVIR-		

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**Lines**

**King Co. Prosecutor**  
**JOHN KEEGAN**  
**ELDON V. C. GREENBERG,**  
**RICHARD A. FRANK**  
**Center for Law & Social**  
**Policy**  
**1751 N Street N.W.**  
**Washington, D.C. 20036**  
**344-3939**

DATE	NR.	PROCEEDINGS
Sept. 8	1	Filed complaint and issued summons.
Sept. 8	2	Filed Notice of Requirement of Three-Judge Court.
Sept. 11		Transferred to Judge McGovern as Judge Sharp has disqualified himself. Notified counsel.
Sept. 10		Ent. order transferring to Judge Goodwin for reassignment.
Sept. 11	3	Filed return on s/c (7)
Sept. 12	4	Transferred to Judge McGovern. Filed order.
Sept. 15	5	Filed certificate as to Three Judge Court.
Sept. 18	6	Filed designation of Circuit Judge Alfred T. Goodwin, Senior Judge William G. East, and District Judge Walter T. McGovern, to hold a three judge court.
Sept. 19		Notified counsel.
Sept. 18	7	Filed return on s/c.
Oct. 8		Ent. order setting chambers conference for 2:00 p.m. on 10/9/75.
Oct. 9		Ent. record of conference.
Oct. 14	8	Filed notice of appearance of Wm. A. Gardiner for David S. McEachran, Whatcom County Prosecutor.
Oct. 14	9	Filed notice of appearance of Charles B. Roe, Jr. for Dan Evans.
Oct. 16	10	Filed notice of appearance of Whatcom County.
Oct. 16	11	Filed letter setting schedule of case including setting 2/23/76 for oral argument and submission of case to three judge court.

**PROCEEDINGS**

*Docket Entries*

DATE	NR.	PROCEEDINGS
Nov. 3		Ent. order setting hearing of this cause for 9:30 a.m. on 2/23/76.
Nov. 17	12	Filed motion to intervene.
Nov. 17	13	Filed affidavit of Rbt. Lynette.
Nov. 17	14	Filed affidavit of Thomas Kimball.
Nov. 17	15	Filed affidavit of Wm. Butler.
Nov. 17	16	Filed affidavit of Brock Evans.
Nov. 17	17	Filed memorandum of points and authorities in support of motion of coalition against oil pollution, The Natl. Wildlife Federation, Sierra Club, and Environmental Defense Fund, Inc. to intervene as defts.
Nov. 17	18	Filed notice of motion, 11/28/75 at 9:30 a.m.
Nov. 17	19	Filed certificate of service.
Nov. 17		Lodged order granting leave to file motion to intervene without a pleading.
Nov. 28		Ent. order continuing motion of Coalition Against Oil Pollution, etc., to intervene to 12/5/75.
Dec. 1	20	Filed memorandum of points and authorities in opposition to motion to intervene.
Dec. 3	21	Filed affidavit of Thomas H. S. Brucker.
Dec. 3	22	Filed reply memorandum in support of motion of Coalition Against Oil Pollution, Natl. Wildlife Federation, Sierra Club, and environmental defense Fund, Inc. to intervene as defts.
Dec. 3	23	Filed certificate of service.
Dec. 5	24	Filed response of defts. Daniel J. Evans, Slade Gorton, Wm. C. Jacobs, Harry Greenwood, Ben. Joyce, Philip Luther, J. Q. Paull, to motion to intervene by Coalition Against Oil

*Docket Entries*

DATE	NR.	PROCEEDINGS
Dec. 5		Pollution, Natl. Wildlife Federation, Sierra Club, and Environmental Defense Fund, Inc.
Dec. 8	25	Motions to intervene submitted without argument.
		Filed response of deft. Whatcom Co. Prosecutor, no objection to motion to intervene.
		1975
Dec. 10	26	Ent. order granting motion to intervene by Coalition Against Oil Pollution, Natl. Wildlife Federation, Sierra Club and Environmental Defense Fund, Inc., per letter of counsel of record this date.
		1976
Jan. 6	27	Filed motion to intervene, Seatrain Lines, Inc.
Jan. 6	28	Filed memorandum of points and authorities in support of motion of Seatrain Lines, Inc. to intervene as a pltf.
Jan. 6	29	Filed notice of intent to file pleading within five calendar days.
Jan. 6	30	Filed affidavit of Howard M. Pack.
Jan. 6	31	Filed notice of motion, 1/16/76 at 9:30 a.m.
Jan. 6	32	Filed certificate of service.
Jan. 7	33	Filed letter from Thomas Brucker.
Jan. 12		Lodged proposed complaint for declaratory and injunctive relief against enforcement.
Jan. 16	34	Filed statement re Seatrain Lines, Inc. motion to intervene.

*Docket Entries*

<b>DATE</b>	<b>NR.</b>	<b>PROCEEDINGS</b>
Jan. 16		Ent. order taking motion of Seatrain Lines to intervene under advisement.
Jan. 19	35	Filed response of intervenors to motion of Seatrain Lines, Inc. to intervene as a party-pltf.
Jan. 20	36	Filed memorandum of points and authorities in opposition to motion of Seatrain Lines, Inc., to intervene as a pltf.
Jan. 22	37	Filed certificate of service of memo. of points, etc.
Jan. 22	38	Filed reply memorandum of points and authorities in support of motion of Seatrain Lines, Inc. to intervene as a pltf.
Jan. 27	39	Filed certificate of service of acceptance of Roe's schedule.
Jan. 28		Ent. record of chambers conference. The court denies the application and motion of Seatrain Lines to intervene pursuant to FRCP 24(a)(2) as a matter of right. Seatrain Lines motion for permissive intervention is granted.
Jan. 28	40	Filed notice of withdrawal and substitution of attorneys for Seatrain Lines, Inc., Lane, Powell, Moss substituted.
Feb. 2	41	Filed proposed complaint for declaratory and injunctive relief against enforcement of Washington Tug Escort Act.
Feb. 6	42	Filed complaint for declaratory and injunctive relief against enforcement of Washington Tug Escort Act.
Feb. 6	43	Filed certificate of service of above complaint.

*Docket Entries*

<b>DATE</b>	<b>NR.</b>	<b>PROCEEDINGS</b>
Feb. 13		Ent. order setting hearing for 9:30 a.m. on 6/25/76.
Feb. 17	44	Filed acknowledgement of service.
Feb. 20	45	Filed acknowledgement of service.
Feb. 20	46	Filed acknowledgement of service.
Mar. 2	47	Filed acknowledgement of service.
Mar. 1		Ent. order granting permission to appear amicus curiae of Young Lawyers Section, King Co. Bar Assoc. and to file an amicus brief. Croil Anderson appearing for the Assoc.
Mar. 31	48	Filed Motion to intervene as a defendant, King Co. Prosecuting Atty. Lodged Order granting intervention.
Apr. 6	49	Lodged Pretrial Order with exhibits.
Apr. 6	50	Filed Statement of plaintiff and intervening plaintiff regarding King County prosecuting attorney's motion to intervene.
Apr. 7		Ent. order granting the motion of the King Co. Prosecutor to intervene as a defendant in this action upon condition that Prosecutor agree to PTO submitted to Court 4/6/76 and to be bound by time table for presenting briefs as presently established; that prosecutor not seek additional time for oral argument over the time allocated to defendant McEachran, Whatcom Co. Prosecuting attorney. All counsel and Judges notified.
Apr. 13	51	Filed Statement of King County Prosecuting Attorney accepting conditions of intervention.

DATE	NR.	PROCEEDINGS
Apr. 23		Ent. order denying motion of American Institute of Merchant Shipping Co. to appear Amicus Curiae. Counsel advised.
Apr. 30	52	Filed Plaintiff's Trial Brief.
Apr. 30	53	Filed Intervening Plaintiff's Brief in support of complaint for declaratory and injunctive relief.
May 3	*	
May 6	54	Filed Notice of motion of the United States of America to intervene as amicus curiae for 5/14/76.
May 6	55	Filed Motion of the United States of America to intervene as Amicus Curiae.
May 6	56	Filed Certificate of service of motion.
May 6		Lodged Order granting motion of the US of A to intervene as Amicus Curiae.
May 11	57	Filed Response in opposition to the motion of the United States to file brief Amicus Curiae.
May 12	58	Filed Motion to strike portions of brief of intervening plaintiff Seatrain Lines, Inc.
May 12	59	Filed Notice of motion of environmental intervenors to strike portion of brief of Seatrain Lines, Inc. for 5/21/76.
May 12	60	Filed Certificate of service.
May 12	61	Filed Response of environmental intervenors in opposition to motion of United States to intervene as Amicus Curiae.

DATE	NR.	PROCEEDINGS
May 12	62	Filed Response in support of the motion of the United States to file brief Amicus Curiae.
May 13	**	
May 14	63	Filed Response of the United States to opposition to its motion to intervene as Amicus Curiae.
May 14		Lodged Order granting motion of the U.S.A. to intervene as Amicus Curiae.
May 14		Ent. order granting U.S. motion to intervene amicus curiae. Counsel notified. Amicus brief due on or before 5/24/76.
May 17	64	Filed Order granting motion of the United States of America to intervene as amicus curiae.
May 18	65	Filed Response of intervening plaintiff Seatrain Lines, Inc. to intervening defendants' motion to strike.
May 21		Ent. order denying environmental intervenors' motion to strike portions of brief of Seatrain Lines, Inc. Counsel advised.
May 24		Ent. order granting state of Maryland leave to file an amicus brief due no later than 6/4/76. Counsel notified.
May 24	66	Filed letter from State of Maryland re filing of amicus brief.
May 26	67	Filed Brief of the United States as Amicus Curiae.
June 1	68	Filed Brief of Amici Curiae of State of Maryland and Maine.
June 7	69	Filed Application for leave to file brief amicus curiae by the State of

DATE	NR.	PROCEEDINGS
June 7		California (joined by the states of Missouri, Pennsylvania and Wisconsin) in support of defendants Daniel J. Evans, et al.
		Lodged Brief of the California Attorney General Amicus Curiae (joined by the States of Missouri, Pennsylvania and Wisconsin) in support of defendants Daniel J. Evans, et al.
	70	Filed Environmental intervenors' Trial Brief.
	71	Filed Brief of State of Washington defendants, Daniel J. Evans, et al.
	72	Filed Memorandum of points and authorities in support of motion to dismiss of defendants Daniel J. Evans, et al, and State of Washington.
	73	Filed Trial Brief of Intervening defendant, King County Prosecuting Attorney
*5/3	53a Filed Application of the Maritime Law Assoc. of the U.S. to file Amicus Curiae brief.	
**5/13	Ent. order authorizing the Maritime Law Assoc. of the U.S. to file Amicus Curiae brief.	
	62a Filed Brief on behalf of the Maritime Law Assoc. of the U.S., Amicus Curiae	
6/10	74 Filed Statement of David S. McEachran, Prosecuting Attorney for Whatcom County, supporting Brief of Christopher T. Bayley, King County Prosecutor, Intervening defendant.	

DATE	NR.	PROCEEDINGS
6/14	75	Filed Supplemental Memorandum of Environmental Intervenors
6/16	76	Filed Application of State of New York to file Amicus Curiae Brief.
		Ent. order denying application of the State of New York to be deemed a party Amicus Curiae on the State of Maryland's memorandum of law as being untimely. Counsel notified.
June 17	77	Filed Motion to supplement the Pretrial Order
	78	Filed Notice of motion to supplement the pretrial order for 6/25/76
June 18	79	Filed Reply Brief of Plaintiff Atlantic Richfield Co.
	80	Filed letter with documents (two) published subsequent to filing Pretrial Order
	81	Filed •Reply Brief of intervening plaintiff Seatrain Lines, Inc.
	82	Filed Memorandum of Points and authorities of plaintiff Atlantic Richfield Company in opposition to "Motion to dismiss of defendants Daniel J. Evans, et al., and State of Washington"
June 21	83	Filed Affidavit setting forth facts concerning notice of motion to supplement the pretrial order with attachments
	84	Ent. order granting State of California (joined by States of Missouri, Pennsylvania and Wisconsin) to file amicus brief. Counsel advised.
		Filed Brief of the California Attorney General as amicus curiae (joined by the

DATE	NR.	PROCEEDINGS	DATE	NR.	PROCEEDINGS
		States of Missouri, Pennsylvania and Wisconsin) in support of defendants Daniel J. Evans, et al.		June 25	96 Filed Pretrial Order
June 22	85	Filed Plaintiff's consent to defendants' motion to supplement the pretrial order			Def. State of Washington's motion to amend PTO granted. Deft. Evans' motion to dismiss denied. Pltf. arco's motion to supplement pretrial order granted.
	86	Filed Certificate of Service.			Ent. hearing on merits. Argument heard. Case taken under advisement.
June 23	87	Filed Affidavit of delivery letter from Mr. Sherwood, Memo of Points and Authorities, and Reply Brief of ARCO to Charles Roe		July 2	97 Filed Motion of Young Lawyers Section to Withdraw as Amicus Curiae and Order. Counsel notified.
	88	Filed Affidavit of delivery of above-mentioned documents to Christopher Bayley		July 13	98 Filed Supplemental Brief of Plaintiff Atlantic Richfield Company on Injunctive relief
	89	Filed Affidavit of Delivery of above-mentioned documents to Ray Haman		July 14	99 Filed Affidavit of Mailing.
	90	Filed Affidavit of delivery of above-mentioned documents to Tom Brucker		July 15	100 Filed Affidavit of delivery of arco brief on The Prosecuting Attorney, Tom Brucker, Lee Johnson, Raymond W. Haman
June 24	91	Filed Motion of United States as Amicus Curiae intervenor for leave to file reply brief and affidavit		Aug. 6	101 Filed brief of defendants and intervening defendants on injunctive relief
	92	Filed Notice of motion of United States as Amicus Curiae intervenor for leave to file reply brief and affidavit for 6/25/76		Aug. 9	102 Filed transcript of proceedings
		Lodged Order granting motion		Aug. 17	103 Filed Reply Brief of Plaintiff Atlantic Richfield Company on injunctive relief
		Lodged Reply Brief of the United States as Amicus Curiae			Filed Certificate of Service
	93	Filed Seatrain's Response to defendants' motion to supplement Pretrial Order			Filed and entered Opinion. Copy to counsel by Court.
June 25	94	Filed Reply Brief of the United States as Amicus Curiae			Filed and entered Order declaring the Washington State Tank Law as null and void. No party shall recover costs. Copy to counsel by Court.
	95	Filed Motion to supplement Pre-Trial order		Sept. 24	105 Filed and entered Judgment. Copy to counsel.
					Filed Motion of Plaintiff Atlantic Richfield Company for Permanent
			Sept. 29	107	
				108	

<b>DATE</b>	<b>NR.</b>	<b>PROCEEDINGS</b>
	109	Injunction in Support of Declaratory Judgment Filed Notice of Motion of Plaintiff Atlantic Richfield Company for Permanent Injunction in Support of Declaratory Judgment; Affidavit of Byron E. Milner and Richard E. Sherwood; and Memorandum of Points and Authorities in Support Thereof
	110	Filed Affidavit of Richard E. Sherwood in Support of Plaintiff Atlantic Richfield Company's Motion for Permanent Injunction in Support of Declaratory Judgment
	111	Filed Affidavit of Byron E. Milner in Support of Plaintiff Atlantic Richfield Company's Motion for Permanent Injunction in Support of Declaratory Judgment
	112	Filed Memorandum of Points and Authorities in Support of Plaintiff Atlantic Richfield Company's Motion for Permanent Injunction in Support of Declaratory Judgment
	113	Filed Motion for Order Shortening Time to give Notice Lodged Order Shortening Time to Give Notice Lodged Order of Permanent Injunction
Sept. 30	114	Filed Response of Environmental Intervenors in Opposition to Plaintiff's Motion for Shortening of time for hearing
	115	Filed Reponse of Governor Daniel J. Evans and Other State defendants in

<b>DATE</b>	<b>NR.</b>	<b>PROCEEDINGS</b>
	116	Opposition to Atlantic Richfield Company's Motion for Shortening Time to Give notice Filed Response of Defendant Bayley in Opposition to Plaintiff's Motion to Shorten Time.
	117	Filed Defendant Bayley's Motion Requesting Hearing of ARCO's Motion for Permanent Injunction
	118	Filed Notice of defendant Bayley's Motion Requesting Hearing for October 8 or October 15
Oct. 5	119	Filed Certificate of Service
Oct. 7	120	Filed Affidavit of Service
	121	Filed Defendant Prosecutor Bayley's Memorandum in Opposition to arco's Motion for Permanent Injunction and in Support of Defendants' Motion for Stay.
	122	Filed def's. Motion to Stay Enforcement of Judgment and Any Injunctive Relief Ordered by the Court
	123	Filed Memorandum of Governor Daniel J. Evans and Other State defendants in Opposition to Motion for Permanent Injunction and in Support of Stay of Judgment of Court Pending Appeal
	124	Filed Notice of Motion to Stay Enforcement of Judgment and any Injunctive Relief Ordered by the Court for 10/15/76 Lodged Order Denying Plaintiff's Motion for Permanent Injunction Lodged Order Granting Plaintiff's Motion for Permanent Injunction and

DATE	NR.	PROCEEDINGS
		Staying Effective Date of Order of Permanent Injunction
	125	Lodged Order Granting Permanent Injunction and Denying a Stay
	126	Filed Certificate of Service
Oct. 8	126	Filed Response of Environmental Intervenors to Plaintiff's Motion for Permanent Injunction in Support of Declaratory judgment.
Oct. 15		Def.'s motion to stay enforcement continued subject to call.
Oct. 21	127	Filed def. State of Wash.'s Notice of Appeal
	128	Filed cost bond in amount of \$300 thru Fireman's Fund for appeal
Oct. 26	129	Filed Reply Memorandum of Plaintiff Atlantic Richfield Company in Support of its motion for injunctive relief and in opposition to Defendants' motion to stay enforcement of judgment.
		Ent. order setting hearing on Plaintiffs' Motion for permanent injunction in support of declaratory judgment for 11/12/76 at 9:30 A.M. Counsel advised by letter.
Nov. 1		Mailed certified copies of Notice of Appeal and docket entries to Circuit Court of Appeals.
Nov. 12		Filed Affidavit of Herbert H. Zachow in Support of plaintiff Atlantic Richfield Company's Motion for permanent injunction.
1976		Ent. record of hearing on Prelim. Inj. and motion for stay.
Nov. 12	130	in Support of Declaratory Judgment

DATE	NR.	PROCEEDINGS
	131	Filed and entered Order of Permanent Injunction. Order is stayed until the 15th day of December 1976. Copy to all counsel.
Nov. 19	132	Filed Notice of Appeal (by State of Wa.) to the Supreme Court of the United States.
Nov. 22	133	Filed Notice of Appeal to the Supreme Court of the United States by Intervenor defendants. Copy to
Nov. 22	134	Filed Notice of Appeal to the Supreme Court of the United States by Prosecuting Attorney
Nov. 23	135	Filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit by State of Wash.
	136	Filed def. State of Wash.'s Motion for Order Suspending Processing of Appeals to the United States Court of Appeals for the Ninth Circuit
	137	Lodged Order Suspending Processing of Appeals to the United States Court of Appeals for the Ninth Circuit
Dec. 1	138	Filed Certificate of Service.
		Filed Order Suspending Processing of Appeals to the United States Court of Appeals for the Ninth Circuit. Copy to counsel.
Dec. 14	139	Filed Certified copy of Order from Supreme Court continuing stay of order of permanent injunction until further order of that Court.
	140	Filed Opinion on Application of Stay, from Circuit Justice of Supreme Court
Dec. 20	141	Filed Request for Certification of Record

DATE	TR.	PROCEEDINGS	
1977			<b>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST ENFORCEMENT OF WASHINGTON TANKER LAW (Three Judge Court)</b>
Jan. 13	142	Filed copy of letter from Supreme Court granting stay of order of permanent injunction.	
Jan. 12		Mailed record on appeal to Supreme Court.	
Mar. 7	143	Filed certified copy of Statement of jurisdiction from Supreme Court.	<b>CIVIL ACTION No. C 75-648</b>

(Names, addresses, and telephone numbers of attorneys omitted in printing.)

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

ATLANTIC RICHFIELD COMPANY,  
*Plaintiff,*

v.

DANIEL J. EVANS, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; WILLIAM C. JACOBS, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER and J. Q. PAULL, Members, Board of Pilotage Commissioners; and DAVID S. McEACHRAN, Whatcom County Prosecutor,

*Defendants.*

Plaintiff for its complaint herein alleges as follows:

*Nature of the Case*

1. This is an action to declare unconstitutional and void and to enjoin the enforcement of Chapter 125, 1975 Laws of the State

of Washington, enacted as Substitute House Bill No. 527, 44th Legislature, 1st Extraordinary Session (hereinafter "the Tanker Law"). The Tanker Law prohibits oil tankers of a certain size from entering Puget Sound and imposes certain design, equipment, pilotage and tugboat requirements on other oil tankers entering Puget Sound. The Tanker Law is unconstitutional on the following grounds:

- (a) It invades a field of regulation which has been preempted by the federal government, and is thus invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2);
- (b) It conflicts with federal statutes and regulations and is thus invalid under the Supremacy Clause;
- (c) It imposes undue burdens upon interstate and foreign commerce, and thereby conflicts with federal power under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) to regulate such commerce.
- (d) It invades a field of regulation in which the federal government has recognized the primacy of international agreement and cooperation, and thereby conflicts with federal power to regulate foreign affairs, to regulate foreign commerce (Article I, Section 8, Clause 3), and to make treaties (Article II, Section 2, Clause 2).
- (e) It conflicts with international agreements to which the United States is a party, and is therefore invalid under the Supremacy Clause;

#### *Jurisdiction and Venue*

2. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331(a) and 1337. The matter in controversy exceeds \$10,000, exclusive of interest and costs. This action presents an actual case or controversy appropriate for declaratory relief pursuant to 28 U.S.C. § 2201.

3. This action seeks injunctive relief against the enforcement of the State statute on the ground that it is unconstitutional, and therefore it must be heard and determined by a three-judge court pursuant to 28 U.S.C. § 2281.

4. The venue of this action is in this Court pursuant to 28 U.S.C. § 1391(b).

#### *Parties*

5. Plaintiff Atlantic Richfield Company is a Pennsylvania corporation with its principal place of business at Los Angeles, California. Atlantic Richfield is an integrated petroleum company, active in all phases of exploration, development, production, transportation, refining and marketing of petroleum and petroleum products. Atlantic Richfield owns and operates a refinery on Puget Sound, at Cherry Point, near Ferndale, Washington, which is primarily supplied by oil tankers subject to the challenged Tanker Law.

6. Defendant Daniel J. Evans is Governor of the State of Washington, and, as the State's chief executive, is charged with overall responsibility for enforcement of the state's laws, including the Tanker Law challenged herein. Defendant Slade Gorton is Attorney General of the State of Washington, and in such capacity is responsible for enforcing the State's laws, including the Tanker Law challenged herein. Defendant William C. Jacobs is Chairman of the Board of Pilotage Commissioners, an administrative body established by Revised Code of Washington (hereinafter R.C.W.) § 88.16.010 which, pursuant to Section 88.16.030, is charged with administration of the Tanker Law. Defendants Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther, and J. Q. Paull are the other members of the Board of Pilotage Commissioners. Defendant Davis S. McEachran is Prosecutor of Whatcom County, in which Atlantic Richfield's Cherry Point refinery is located, and has jurisdiction to bring criminal prosecution against Atlantic Richfield for violation of the Tanker Law taking place in that county.

#### *The Challenged Statute*

7. The Tanker Law was enacted by the State Legislature in May 1975 and signed into law by Governor Evans on May 29, 1975. A copy of the statute is annexed hereto as Appendix I. The statute goes into effect on September 8, 1975; the Board of Pilotage Commissioners, by order dated August 11, 1975, has

declared its intention to begin enforcement of the statute on such date.

8. The Tanker Law imposes substantial restrictions on the operation of oil tankers in Puget Sound, for the stated purpose of protecting Puget Sound and adjacent waters and shorelines from the danger of oil spills. Section 2 of the statute provides that any oil tanker, whether enrolled (i.e., engaged solely in interstate as opposed to foreign commerce) or registered (i.e., entitled to engage in foreign commerce), of 50,000 deadweight tons (DWT) or more, must employ a pilot licensed by the State of Washington while navigating Puget Sound. Section 3(1) of the statute prohibits any oil tanker of more than 125,000 DWT from entering Puget Sound. Section 3(2) prohibits any oil tanker between 40,000 DWT and 125,000 DWT from entering Puget Sound unless it has all of the following: shaft horsepower of at least one horsepower for each 2.5 DWT; twin screws; double bottoms; two radars, one of which must be collision-avoidance radar; and any other navigational systems as may be prescribed by the Board of Pilotage Commissioners. A proviso to Section 3(2), however, waives compliance with that Section if the tanker is under the escort of tugboats with an aggregate horsepower of 5% of its deadweight tonnage.

9. The Tanker Law adds these statutory provisions to the State Pilotage Act, R.C.W. Chapter 88.16. Pursuant to R.C.W. Section 88.16.030, the Board of Pilotage Commissioners is charged with administration of the Tanker Law and is authorized to promulgate rules and regulations thereunder. Pursuant to Section 88.16.150, violation of the Tanker Law is a misdemeanor.

#### *Federal Preemption*

10. The Tanker Law is invalid and unconstitutional because it invades a field of regulation which has been preempted by federal law. The United States has undertaken comprehensive regulation of oil tanker design and construction, safety and equipment requirements, navigational controls and vessel movement control systems. The relevant federal statutes and regulations evidence a congressional intention completely to

occupy this field and to establish a uniform system of federal regulation of oil tankers to the exclusion of state authority.

11. Federal occupation of the relevant field is demonstrated by the Ports and Waterways Safety Act of 1972 (hereinafter PWSA), Pub. L. 92-340, 86 Stat. 424 (July 10, 1972). A copy of this statute is annexed hereto as Appendix II. PWSA establishes a comprehensive regulatory scheme for vessel design, equipment and navigational control, and thus embraces both the objective and the regulatory scheme of the Tanker Law. While Titles I and II of PWSA overlap, Title I is primarily concerned with vessel traffic and navigational control, while Title II is primarily concerned with vessel design and equipment.

12. Title I of PWSA, 33 U.S.C. §§ 1221 et seq., gives the Secretary of Transportation authority to promulgate regulations

"to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structural damage, destruction, or loss" (§ 101).

This broad authority specifically includes regulation of vessel traffic in hazardous areas (§ 101[3]) by

- a) limitation of vessel size (§ 101[3][iii] and
- b) restriction of vessel operation to those having particular characteristics or capabilities necessary for safe operation (§ 101[3][iv]).

13. Title I guarantees that State and local governments have an opportunity to participate in the development of *federal* regulations and standards by providing in Section 104:

"In preparing proposed rules, regulations and standards, the Secretary shall provide an adequate opportunity for consultation and comment to State and local governments, representatives of the marine industry, port and harbor authorities, environmental groups, and other interested parties."

14. In determining the need for and substance of such regulations, Section 102(e) directs the Secretary to consider a wide range of factors including environmental considerations, the need for efficient conduct of maritime commerce and the economic impact of such regulations.

15. Section 102(b) of Title I confirms congressional intent to preempt as to vessels by specifically permitting stricter state regulation "for structures only."

16. Pursuant to 49 C.F.R. § 1.46(o)(4)(1974), the Secretary of Transportation has delegated his rulemaking authority under the PWSA to the Commandant of the Coast Guard. The Coast Guard has promulgated regulations to implement Title I of the PWSA. Such rules delegate authority to the Captain of the Port to determine on a case-by-case basis whether conditions require establishment of vessel size and speed limitations or restriction of vessel operations to vessels having particular operating characteristics and capabilities necessary for safety. 40 Fed. Reg. 6653 (Fed. 13, 1975), 33 C.F.R. Part 160. Additional regulations proposed by an advance notice of proposed rulemaking would direct the Captain of the Port, in exercising such authority, to consider, among other factors, the hull design of the tanker, including the presence or absence of a double bottom and cargo segregation; the tanker's propulsion system, including its horsepower, number of shafts, and other variables which affect controllability and maneuverability; whether tugboats are in attendance; and whether a pilot is aboard. 39 Fed. Reg. 24157 (June 28, 1974). The advance notice of proposed regulations would also require various navigational devices, including two radars, one of which must be equipped with an anti-collision device, on oil tankers over 10,000 gross tons. *Id.* The Coast Guard has promulgated one set of regulations directed specifically to Puget Sound, establishing a vessel traffic control system to reduce the likelihood of an accident. 39 Fed. Reg. 25430 (July 10, 1974), 33 C.F.R. Part 161, Subpart B.

17. Title II of the PWSA amended the Tank Vessel Act, 46 U.S.C. § 391a, for the express purpose of "protecting the marine environment" by establishing comprehensive standards of design,

construction, equipment and operation of oil tankers. Section 3 of the amended statute gives the Secretary of Transportation broad authority to adopt regulations with respect, *inter alia*, to "the design and construction \* \* \* of such vessels, including \* \* \* superstructures, hulls, \* \* \* equipment, appliances, [and] propulsive machinery, \* \* \* and with respect to the operation of such vessels," thereby including all of the subject matter of the Washington Tanker Law.

18. Title II identifies the objectives of the regulations to be adopted by the Secretary of Transportation:

"Such rules and regulations shall, to the extent possible, include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities." (Sec. 7)

19. Title II also establishes requirements for inspection of both domestic and foreign tankers (Sec. 5 and 6) and further provides that the Secretary may deny entry to the U. S. waters of tankers in violation of the statute or regulations

20. Pursuant to the authority of Title II, the Coast Guard published proposed comprehensive design and construction regulations applicable to tankers in the coastwise (interstate) trade. 39 Fed. Reg. 24150 (June 28, 1974). In a Final Environmental Impact Statement dated August 15, 1975, the Coast Guard announced that such regulations are to be made final, with minor changes, on or about September 15, 1975. It also announced that substantially similar, if not identical, regulations to implement Title II as to tankers engaged in foreign commerce would be promulgated in the near future. Section 7(C) of PWSA directs that such regulations be promulgated not later than January 1, 1976.

21. The regulations referred to in Paragraph 20 completely cover the field of tanker design, construction and required equipment. They require segregated ballast tanks on new tankers

over 70,000 DWT, which must be distributed between the cargo tanks and the vessel's hull or between cargo wing tanks so as to mitigate the effects of collisions or groundings. They impose restrictions on the size and arrangement of cargo tanks in new tankers, including requirements for segregation of cargo tanks, in order to limit the outflow of oil in case of accident. The regulations provide incentive for the adoption of double bottoms and/or double sides by relaxing restrictions otherwise applicable to cargo tank arrangement and size. The regulations do not require double bottoms, twin screws, or increased horsepower. Imposing such requirements was considered by the Coast Guard and expressly rejected, as explained in the environmental impact statement, in large part because of the importance of avoiding unilateral action by the United States not in conformance with international agreements.

22. In its consideration of the PWSA, Congress recognized that regulation of oil tanker design, construction, equipment and operation was international in scope. Congress was particularly aware of the then impending 1973 International Conference on Marine Pollution held under the auspices of the Inter-Governmental Maritime Consultative Organization (IMCO), an arm of the United Nations. Therefore, in section 7(C) Congress authorized the Secretary to delay implementation of Title II until after this Conference, and to defer to such rules and regulations as might be established by "international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment."

23. Congress' concern for international uniformity in the regulation of tanker design was recognized by the Coast Guard, for its proposed regulations under Title II are consistent with and incorporate the standards enunciated in the International Convention for the Prevention of Pollution from Ships, 1973, adopted by the International Conference on Marine Pollution.

24. Congress has demonstrated in other statutes both its intent to preempt the regulation of the field and its concern for international uniformity.

*Conflict With Federal Statutes*

25. The Tanker Law is invalid and unconstitutional under the Supremacy Clause because it conflicts with various federal statutes and regulations.

26. Section 2 of the Tanker Law, requiring all tankers over 50,000 DWT, whether enrolled or registered, to employ a pilot licensed by the State, conflicts with federal pilotage laws to the extent that it requires an enrolled vessel to employ a local pilot, and is thus invalid under the Supremacy Clause. 46 U.S.C. § 364 provides, in pertinent part:

"[E]very coastwise seagoing steam vessel [including oil tankers, however propelled, 46 U.S.C. § 391a] subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the Coast Guard."

46 U.S.C. § 215 provides:

"No State or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States \* \* \*."

While Section 215 further provides that the statute shall not be construed "to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State \* \* \* to take a pilot duly licensed or authorized by the laws of such State," this proviso applies only to vessels "other than coastwise steam vessels." The net effect of these statutes, as they have been consistently interpreted for over 100 years, is that a State may require State-licensed pilots on registered vessels, but may not require such pilots on enrolled vessels.

27. Section 3(1) of the Tanker Law, prohibiting any oil tanker over 125,000 DWT, whether enrolled or registered, from entering Puget Sound, conflicts with the federal shipping laws which authorize enrolled and licensed vessels to engage in interstate commerce. 46 U.S.C. § 319 requires that every vessel of twenty tons or more engaged in interstate commerce, other than

registered vessels, be enrolled and licensed. 46 U.S.C. § 251 grants to enrolled and licensed vessels "the privileges of vessels employed in the coasting trade," i.e., the right to engage in interstate commerce. Pursuant to these statutes and the rights granted thereunder, a State may not prohibit a federally enrolled and licensed vessel from entering its navigable waters.

28. Section 3(1) of the Tanker Law also conflicts with the federal shipping laws which authorize registered vessels to engage in interstate and foreign commerce. 46 U.S.C. § 221 grants to registered vessels "the rights and privileges appertaining to \* \* \* vessels of the United States." Pursuant to this statute and the rights granted thereunder, a state may not prohibit a federally registered vessel engaged in the exercise of these rights from entering its navigable waters.

29. The Tanker Law conflicts with the PWSA by imposing requirements beyond those contained in regulations promulgated by the Coast Guard. In promulgating such regulations, the Coast Guard is required to consider a broad range of factors, including the efficient conduct of maritime commerce, the extent of interference with the flow of commercial traffic, the economic impact of such regulations, the extent to which such regulations will contribute to protection of the marine environment, and the practicability of compliance therewith, including cost and feasibility (PWSA §§ 102(e), 201(4)). The Coast Guard's decision not to impose more stringent requirements with respect to tanker design, construction, equipment, and navigational controls than those imposed by the present regulations and those to be promulgated represents a controlling federal determination that further requirements should not be imposed. For example, as noted in Paragraphs 20 and 21 herein, the Coast Guard has expressly rejected requiring double bottoms, twin screws or increased horsepower.

30. The Tanker Law conflicts with the PWSA by prohibiting tankers over 125,000 DWT holding certificates or permits issued pursuant to Sections 5 and 6 of Title II from entering Puget Sound and by imposing on smaller tankers requirements beyond those

necessary to obtain such certificates or permits. Sections 5 and 6 require that all oil tankers be inspected by the Coast Guard; that foreign tankers obtain a certificate of compliance with rules and regulations promulgated for protection of the marine environment; that domestic tankers obtain a certificate of compliance with rules and regulations promulgated for vessel safety and for protection of the marine environment; and that domestic tankers obtain a permit authorizing the carriage of oil. This inspection, certification and permit procedure represents a controlling federal determination that the particular vessel meets all necessary safety and environmental standards and is entitled as a matter of right to engage in the carriage of oil.

#### *Invalidity Under Commerce Clause*

31. The Tanker Law impinges upon federal power to regulate interstate and foreign commerce and imposes an undue burden upon such commerce, and is therefore invalid under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).

32. The establishment of standards governing the design, construction, equipment, and operation of oil tankers vitally affects a phase of interstate and foreign commerce in which national uniformity is essential and which therefore demands exclusive federal regulation. If the State of Washington can constitutionally impose such standards, so may each of the other coastal states, and each state is likely to impose differing and inconsistent requirements. Such a patchwork of state regulation would substantially and adversely affect the transportation of crude oil to the United States. Because of the enormous capital expenditures required to construct oil tankers, neither Atlantic Richfield nor any other company can maintain a separate fleet of tankers to serve refineries in each state in which it operates. Economical use of tankers requires the flexibility for each to serve many ports. The Tanker Law, alone or in conjunction with differing requirements of other states, would restrict the ports at which tankers can call and thereby prevent the efficient use of tankers. The threat of proliferation of differing state laws makes planning and construction of new tankers to serve the United

States difficult if not impossible. The cumulative effect of these burdens would substantially increase the cost of crude oil to American refineries and the cost of petroleum products to American consumers.

33. The Tanker Law unduly burdens interstate commerce. For example, Atlantic Richfield's Cherry Point refinery was designed and constructed specifically to refine crude oil from the North Slope of Alaska. Such oil is to be transported by the Trans-Alaska Pipeline, presently under construction, to the Port of Valdez, Alaska, and from there by tanker to the lower 48 states. Section 3(1) will require use of greater numbers of tankers, thus slowing the movement and increasing the cost of such oil to refineries in Washington and increasing the cost of petroleum products to consumers in Washington and other states. The proviso to Section 3(2) will require the use of tugboats to avoid the economic impact of the design and equipment requirements of that Section, and Section 2 will require the use of local pilots, likewise slowing the movement and increasing the cost of Alaskan oil.

34. The Tanker Law unduly burdens the foreign commerce of the United States. For example, it will slow the movement and increase the cost of oil from the Persian Gulf to Cherry Point. It will also exclude from Puget Sound ports a large number of vessels of foreign registry and disrupt trade and other relations with such foreign countries.

35. The Tanker Law adversely affects settled practices of international trade in the oil industry. Tankers over 125,000 DWT are in general use throughout the world, and many more are under construction, including four being constructed for Atlantic Richfield. No smaller tanker currently afloat meets the design and equipment standards of Section 3(2). While this Section permits a smaller tanker to escape those standards by use of tugboats, it does so only at substantial cost. The local pilot requirement of Section 2 adds additional cost.

#### *Invalidity Under Foreign Affairs Power*

36. The Tanker Law conflicts with the federal power to make

treaties (Article II, Section 2, Clause 2), to regulate foreign commerce (Article I, Section 8, Clause 3), and to regulate foreign affairs.

37. The conduct of international shipping of oil by tankers is a matter of major world-wide concern. Most of the world's oil is carried from producing countries to consuming countries by tanker, and such tanker operations constitute a substantial percentage of the total international maritime commerce. The international tanker fleet contains ships flying the flags of many different countries. Many tankers of foreign registry, including tankers exceeding 125,000 DWT, have called at Cherry Point or other United States ports, and will be adversely affected, if not excluded, by the Tanker Law or the enactment of similar state laws. Oil tankers are constructed by shipbuilders in a number of foreign nations, shipbuilders will also be adversely affected by the Tanker Law or the enactment of similar state laws. To the extent that regulation of oil tankers affects the availability and cost of oil to consuming nations, such regulation is vitally important to virtually every nation in the world. To the extent that regulation of oil tankers imposes limitations on the use of the world's tanker fleet and affects the shipbuilding industry of many foreign nations, such regulation is of significant concern to the principal maritime trading nations. Because of the international nature of tanker ownership, construction, and trade patterns, the regulation of tanker design, construction and operations by international agreement is desirable, if not essential.

38. Prevention of oil pollution by establishment of standards of tanker construction, design, equipment and operation is also an issue of major international concern. As is more particularly described in paragraphs 43-47 below, several international conferences have been held in recent years and have achieved substantial progress in obtaining international agreement on measures to prevent oil pollution resulting from oil tanker operations. Further conferences to consider additional regulations to prevent such pollution are planned. As these efforts recognize, pollution of the seas by oil tankers is an international problem which requires a coordinated international solution to achieve any significant progress.

39. The federal government has recognized that international agreement and cooperation is essential in this area. The United States has been active in the several international conferences, and has been instrumental in securing the international agreements and cooperation thus far achieved. Congress in its passage of the PWSA recognized the necessity for international solution of the pollution problem and specifically authorized the Coast Guard to defer to the standards established by international agreement. The regulations to be promulgated by the Coast Guard under the PWSA in fact incorporate and are substantially based upon the standards established by international agreement. The Coast Guard rejected additional regulations in large part because of its view that international cooperation in oil pollution control efforts is essential.

40. Unilateral action by the State of Washington to impose standards of tanker construction, design, equipment and operation substantially undercuts the efforts of the federal government to secure international agreement on tanker regulation, and thus infringes the treaty-making and foreign affairs powers of the federal government.

41. Unilateral action by the State of Washington to impose standards of tanker construction, design, equipment and operation substantially and adversely affects the foreign trade and foreign relations of the United States. Such action by the State could cause loss of foreign trade, retaliatory actions by foreign governments against United States shipping, and adverse effects on foreign relations, particularly with major shipping and shipbuilding nations. Such regulation of oil tankers must be prescribed exclusively by the federal government.

#### *Conflict With International Agreements*

42. The Tanker Law conflicts with the obligations of the United States under several international agreements and is therefore invalid under the Supremacy Clause.

43. The Safety of Life at Sea Convention of 1960 (SOLAS), to which the United States is a party, requires periodic inspection

by the government of the country in which a ship is registered of its "hull, machinery and equipment \* \* \* in order to insure that their condition is in all respects satisfactory \* \* \* for the service for which the ship is intended." Chapter I, Regulation 10. Regulation 12 provides that the government shall thereafter issue the ship a certificate attesting to the satisfactory condition of the ship for such service. Regulation 17 requires that each nation party to the Convention shall accept the certificate issued by the government of registry for all purposes under the Convention. The Tanker Law, by excluding certificated oil tankers of foreign registry from entering Puget Sound, or penalizing such tankers for not meeting the additional requirements of the Washington law, constitutes a refusal to recognize the certificate of the foreign government that the vessel is fit for the service in which it is engaged, and therefore conflicts with the obligations of the United States under SOLAS.

44. SOLAS contains a number of provisions specifying construction standards, design features, and required navigational equipment applicable to oil tankers, as well as cargo and passenger ships. Among such provisions are Chapter II, Regulation 29, specifying required steering gear; Chapter II, Regulation 54, specifying standards of construction and materials for ships of 4,000 gross tons or more; Chapter II, Regulation 65, requiring certain fire fighting equipment; and Chapter IV, Regulation 3 requiring radiotelegraph equipment on ships of 1,600 gross tons or more. Additional requirements imposed by the Tanker Law in the area of vessel design and construction and required safety and navigation equipment are in derogation of the international scheme to which the United States has subscribed, and are therefore invalid.

45. The Tanker Law also conflicts with the provisions of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended on October 15, 1971, pursuant to Resolution A.246 of the Seventh IMCO Assembly. Annex C of this Convention, as amended, establishes standards governing cargo tank arrangement and segregation, and imposes limitations upon tank size for new oil tankers, for the purpose of protecting the marine environment. The standards adopted by IMCO were those

advanced by the United States in the IMCO Assembly. The United States has not yet ratified the Convention, but the Oil Pollution Act Amendments of 1973, Pub. L. 93-119, 87 Stat. 424 (October 4, 1973), adopted its standards. 33 U.S.C. § 1004a. This statute will become operative only upon ratification of the Convention by the United States. In the meantime, however, the Coast Guard has published proposed regulations which would put the IMCO standards into effect administratively. The Washington Tanker Law, by imposing additional and differing standards intended to achieve the same purposes, is in conflict with the international scheme in which the United States has played a central part.

46. The Tanker Law also conflicts with the International Convention for the Prevention of Pollution from Ships, adopted in November 1973 by the International Conference on Marine Pollution. This Convention establishes a comprehensive scheme regulating the discharge of oil from tankers and the design and construction of new oil tankers in order to protect the marine environment. In Regulation 13, the Convention requires each new oil tanker of 70,000 DWT or more to have segregated ballast tanks. Chapter III imposes design and construction standards intended to minimize oil pollution from tankers in the event of accident. Regulation 24 adopts the provisions of the International Convention for the Prevention of Pollution of the Sea by Oil respecting limitation of size, and segregation and arrangement of cargo tanks. Regulation 25 establishes standards designed to insure the stability of tankers in the event of accident so as to limit the amount of oil spilled in such event. Regulation 23 specifies the calculations required to determine the precise standards imposed by Regulations 24 and 25, and in such calculations provides for credit if the tanker is fitted with a double bottom. Regulation 4 requires periodic tanker inspection to insure that the standards of the Convention are met, and Regulation 5 provides for issuance of a certificate of compliance to tankers meeting such requirements.

47. The United States actively participated in the proceedings leading to adoption of the Convention. While the Convention has not yet been ratified by the United States, Section

7(C) of Title II of the PWSA authorizes the Coast Guard to defer to standards established by the Convention, and Coast Guard regulations scheduled to become effective September 15 in fact do adopt these standards. The Washington Tanker Law establishing additional and differing standards for the construction, design and operation of oil tankers is in conflict with the international scheme in which the United States has played a substantial part.

#### *Irreparable Injury*

48. Enforcement of the Tanker Law by the defendants will cause Atlantic Richfield great and immediate irreparable injury.

49. Tankers over 125,000 DWT have been constructed in recent years and are now in general use throughout the world because they lower the cost of transporting oil in large quantities and are the most economically efficient means of transporting such oil. Tankers over 125,000 DWT have been calling regularly at Atlantic Richfield's Cherry Point refinery. Atlantic Richfield has under construction four tankers over 125,000 DWT, at an aggregate cost in excess of \$200,000,000. Section 3(1) of the Tanker Law, prohibiting all tankers over 125,000 DWT from entering Puget Sound, thereby will deprive Atlantic Richfield of the most efficient use of its existing and planned tanker fleet, including tankers available on the world charter markets, and will adversely affect the cost of serving and operating its Cherry Point refinery.

50. No tanker currently meets the design, construction and equipment requirements of Section 3(2) of the Tanker Law. Modification of existing tankers to comply with these requirements would be prohibitively expensive. As a result, Atlantic Richfield will be compelled to employ unnecessary tugboats to escort each of its tankers to Cherry Point, at considerable continuing cost. If such tugboats are unavailable in sufficient sizes or numbers, Atlantic Richfield will incur further costs as well as delays.

51. Tanker construction requires exceptionally long lead times. The design, construction and equipment requirements of Section 3 of the Tanker Law, coupled with the threat of similar statutes elsewhere, at the same time that the federal government is imposing different standards, create uncertainty and make it impracticable for Atlantic Richfield to plan effectively to meet its future oil transportation needs.

52. The requirement of Section 2 of the Tanker Law that local pilots be employed on all tankers over 50,000 DWT imposes an additional continuing cost on most tankers used by Atlantic Richfield to serve its Cherry Point refinery.

WHEREFORE, plaintiff prays:

1. That the Tanker Law be declared unconstitutional, void and unenforceable;
2. That defendants, their agents, and any person acting on their behalf, at their direction or under their control be permanently enjoined from taking any action to implement or enforce the provisions of the Tanker Law;
3. That pending final determination of this action, defendants, their agents, and any person acting on their behalf, at their direction or under their control be, upon further application by plaintiff, preliminarily enjoined from taking any action to implement or enforce the provisions of the Tanker Law; and
4. That plaintiff recover its costs of suit herein together with such other and further relief as the Court may deem just and proper.

DATED: September 8, 1975

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WARREN CHRISTOPHER  
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## **PRE-TRIAL ORDER**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

No. C 75-648

ATLANTIC RICHFIELD COMPANY,

*Plaintiff,*

*and*

SEATRAIN LINES, INCORPORATED,

*Intervening Plaintiff,*

vs.

DANIEL J. EVANS, et al.,

*Defendants,*

*and*

COALITION AGAINST OIL

POLLUTION, et al.,

*Intervening Defendants.*

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**PRETRIAL ORDER**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE JUDGE COURT**

(Names, addresses, and telephone numbers of attorneys omitted in printing.)

As the result of a pretrial conference between attorneys for plaintiff, defendants and intervenors, the following facts were agreed upon, issues of fact and law framed and exhibits identified:

**I. ADMITTED FACTS**

1. This is an action seeking to declare unconstitutional and void and to enjoin the enforcement of Chapter 125, 1975 Laws of the State of Washington, enacted as Substitute House Bill No. 527, 44th Legislature, 1st Extraordinary Session (hereinafter H.B. 527).

**JURISDICTION AND VENUE**

2. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331(a) and 1337. The matter in controversy exceeds \$10,000, exclusive of interest and costs. This action presents an actual case or controversy appropriate for declaratory relief pursuant to 28 U.S.C. § 2201. Defendants represented by the Office of the Attorney General contend that the Eleventh Amendment to the United States Constitution precludes this Court's jurisdiction.

3. This action seeks injunctive relief against the enforcement of a State statute on the ground that it is unconstitutional, and therefore it must be heard and determined by a three-judge court pursuant to 28 U.S.C. § 2281.

4. The venue of this action is in this Court pursuant to 28 U.S.C. § 1391(b).

**PARTIES**

5. Plaintiff Atlantic Richfield Company is a Pennsylvania corporation with its principal place of business in Los Angeles, California. Atlantic Richfield is an integrated petroleum company in domestic and international commerce, active in all phases of exploration, development, production, transportation, refining and marketing of petroleum and petroleum products. Atlantic Richfield owns and operates a refinery at Cherry Point, near Ferndale, Washington, which is primarily supplied by oil tankers subject to challenged H.B. 527.

6. Seatrain Lines, Inc. is a Delaware corporation with its principal place of business in New York. Seatrain Lines, Inc. owns and operates vessels in domestic and international commerce and is a shipbuilder in the United States. Seatrain Shipbuilding Corp., a wholly owned subsidiary of Seatrain Lines, Inc., operates a shipyard in Brooklyn, New York. (Both Seatrain Lines, Inc. and Seatrain Shipbuilding Corp. are hereinafter referred to as "Seatrain".)

7. Defendant Daniel J. Evans is Governor of the State of Washington, and, as the State's chief executive, is charged with seeing that the laws of the State, including H.B. 527, are faithfully executed. Defendant Slade Gorton is Attorney General of the State of Washington, and in such capacity is required to serve as the legal advisor of state officers and to perform such other duties as may be prescribed by law. Among these duties is to institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer. Defendant William C. Jacobs is Chairman of the Board of Pilotage Commissioners, an administrative agency of the State of Washington established by Section 88.16.010 of the Revised Code of Washington (hereinafter "R.C.W."), which, pursuant to R.C.W. § 88.16.030, is charged with administration of H.B. 527. Defendants Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther, and J. Q. Paull are the other members of the Board of Pilotage Commissioners. Defendant David S. McEachran is Prosecuting Attorney of Whatcom County,

in which Atlantic Richfield's Cherry Point refinery is located, and is empowered to prosecute actions involving violations of H.B. 527 occurring in Whatcom County, or occurring onboard a ship passing through the waters of Whatcom County when the place of violation by the vessel cannot be determined.

8. Intervening defendant The Coalition Against Oil Pollution is a non-partisan, non-profit corporation organized and existing under the laws of the State of Washington, established for the stated purposes of preservation of the beauty and natural resources of Puget Sound; development of aquaculture and other marine industries; encouragement of oceanographic research; and creation of stringent laws governing the exploration, transportation, handling and refining of oil in the Puget Sound region. Its principal office is located in Redmond, Washington. Intervening defendant National Wildlife Federation (NWF) is a national, non-profit organization incorporated under the laws of the District of Columbia, with a principal place of business in that city. NWF is a conservation-education organization the stated purpose of which is to foster an awareness of the need to conserve and restore the human environment and the natural resources of the United States. Intervening defendant Environmental Defense Fund, Inc. (EDF) is a non-profit, public benefit membership corporation organized and existing under the laws of the State of New York. Its principal office is located in East Setauket, New York, and it maintains branch offices in Berkeley, California; Denver, Colorado; New York, New York; and Washington, D.C. EDF is an organization made up of scientists and other citizens whose stated goal is effective protection of the human environment and the wise use of natural resources. Intervening defendant The Sierra Club is a non-profit organization, incorporated under the laws of the State of California, with its principal offices in San Francisco, California, an office in Washington, D.C., and an office of international environmental affairs in New York, New York. The Sierra Club is a conservation organization the stated purpose of which has been to enlist public cooperation in the protection of the natural environment and its resources, to provide the public with information relevant to environmental issues, and to stimulate informed public discussion with respect to such issues. Each of these Intervenors has members who reside near Puget

Sound and who use the waters and shoreline of Puget Sound for recreational and other purposes.

## **THE CHALLENGED STATUTE**

9. H.B. 527 was passed by the Washington Legislature in May 1975 and signed into law by Governor Evans on May 29, 1975. A copy of the statute, now codified in R.C.W. ch. 88.16, together with a message of the Governor relating to its approval, is annexed as Exhibit A. The statute went into effect on September 8, 1975; the Board of Pilotage Commissioners began enforcement of the statute on that date.

10. H.B. 527 states, *inter alia*:

"Sec. 2. \* \* \* [A]ny oil tanker, whether enrolled or registered, of fifty thousand deadweight tons<sup>1</sup> or greater, shall be required to take a Washington state licensed pilot while navigating Puget Sound and adjacent waters<sup>2</sup>. \* \* \*

"Sec. 3. \* \* \* (1) Any oil tanker, whether enrolled or registered, of greater than one hundred and twenty-five thousand deadweight tons shall be prohibited from \* \* \* [entering Puget Sound].

"(2) An oil tanker, whether enrolled or registered, of forty to one hundred and twenty-five thousand deadweight tons may \* \* \* [enter Puget Sound] if such tanker possesses all of the following standard safety features:

(a) Shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons; and

(b) Twin screws; and

---

<sup>1</sup>The term "deadweight tons" is defined by the Board of Pilotage Commissioners for purposes of H.B. 527 as the cargo-carrying capacity of a vessel, including necessary fuel oils, stores, and potable waters, as expressed in long tons (2240 pounds equals one long ton).

<sup>2</sup>"Puget Sound and adjacent waters" (hereinafter "Puget Sound") is defined in H.B. 527 as those waters east of a line extending from Discovery Island Light south to New Dungeness Light.

- (c) Double bottoms, underneath all oil and liquid cargo compartments; and
- (d) Two radars in working order and operating, one of which must be collision avoidance radar; and
- (e) Such other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners:

*Provided*, That, if such forty to one hundred and twenty-five thousand deadweight ton tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker, subsection (2) of this section shall not apply: *Provided further*, That additional tug shaft horsepower equivalencies may be required under certain conditions as established by rule and regulation of the Washington utilities and transportation commission pursuant to chapter 34.04 RCW: *Provided further*, That a tanker of less than forty thousand deadweight tons is not subject to the provisions of this act."

11. The Board of Pilotage Commissioners, on August 11, 1975, issued an order implementing H.B. 527. A true copy of such order is filed herewith as Exhibit B.

12. H.B. 527 has been and will be applied to all oil tankers in excess of 40,000 DWT which enter Puget Sound regardless of the national flag such tankers fly.

13. Atlantic Richfield has been complying with H.B. 527 since it became effective. No Seatrain tanker has entered Puget Sound since the effective date of H.B. 527.

## II. FACTS NOT TO BE CONTESTED

The following facts, while not admitted, are not to be contested for purposes of this litigation. Each shall be admissible in evidence, but each party reserves the right to contest the materiality or relevance of such facts.

14. Atlantic Richfield owns and operates a refinery at Cherry Point, near Ferndale, Washington. This refinery is located

adjacent to the Straits of Georgia, east of the line extending from Discovery Island Light south to New Dungeness Light and within the waters regulated by H.B. 527. It has docking facilities on these waters. The Cherry Point refinery has the capacity to process approximately 96,000 barrels<sup>3</sup> of crude oil per day.

15. The Cherry Point refinery and associated facilities were built and began operation in 1971 and are presently valued by the Whatcom County assessor at approximately \$154 million. The refinery was designed and built to refine crude oil from the North Slope of Alaska when it becomes available. The refinery is capable of refining and has refined crude oil from other sources. Since 1971 the refinery has received sufficient crude oil to operate at above 85 per cent of capacity each year, and Atlantic Richfield presently plans to continue to operate the refinery at or above that level. Alaskan North Slope oil is now expected to begin to flow in 1977 and Atlantic Richfield presently intends to transport its share of that oil from the southern terminus of the Trans-Alaska Pipeline at Valdez, Alaska to Cherry Point and other West Coast ports by tanker.

16. The following table sets out the approximate amounts and sources of crude oil received by Atlantic Richfield's Cherry Point Refinery since 1972:

Year	Total Crude Receipts (barrels per day)	Canadian Crude Receipts (barrels per day)	Tanker Crude Receipts (barrels per day)	Percentage Received by Tanker
1972	84,800	74,400	10,400	12%
1973	97,000	60,700	36,300	27%
1974	90,800	40,800	50,000	56%
1975	94,200	31,500	62,700	67%

The crude oil received by tanker has originated primarily in the Persian Gulf; the Canadian crude was received primarily through the Canadian Transmountain Pipeline. The Canadian Minister of Energy, Mines and Resources has announced that his government intends to end all oil exports to the United States by the early

<sup>3</sup>One barrel of crude oil is equal to 42 U.S. gallons. There are approximately 7.2 barrels (or 302 gallons) of crude oil in one long ton. One long ton is equal to 2,240 pounds. One short ton is equal to 2,000 pounds.

1980's. If that occurs, Atlantic Richfield plans to supply by tanker all crude oil to be refined at Cherry Point.

17. Since Atlantic Richfield's Cherry Point refinery commenced operations, its docks have received through 1975, 95 deliveries of crude oil in tankers with deadweight tonnages in excess of 40,000 deadweight tons ("DWT") and not more than 125,000 DWT. The breakdown of the receivings is as follows:

<b>Year</b>	<b>No. of Arrivals</b>
1972	5
1973	21
1974	32
1975	37
	—
	95

In addition, it has received 10 deliveries of crude oil in tankers of 40,000 DWT or less for same period as follows:

<b>Year</b>	<b>No. of Arrivals</b>
1972	8
1973	2
1974	0
1975	0
	—
	10

A list of the tankers by date of arrival, name, size and flag is set forth in Exhibit C.

18. The docking facilities at Atlantic Richfield's Cherry Point refinery are capable of docking, and before the challenged statute did dock, tankers in excess of 125,000 DWT. Fifteen crude oil tankers over this size have called at Cherry Point from the commencement of refinery operations through the date H.B. 527 became effective. The annual breakdown of such dockings is as follows:

<b>Year</b>	<b>No. of Arrivals</b>
1972	3
1973	4
1974	3
1975	5
	—
	15

At least ten of these tankers were fully loaded. (A list of the tankers by date of arrival, name, size and flag is set forth in Exhibit D.) None of the above tankers was a United States flag vessel or owned by Seatrain.

19. There are five other refineries located adjacent to Puget Sound and served by tankers subject to H.B. 527 (the location of these refineries and Atlantic Richfield's refinery is shown on a map of the State of Washington annexed as Exhibit E).

A. Mobil Oil Company's refinery located near Ferndale, Washington, has a processing capacity of 71,500 barrels per day. Crude oil is supplied to it both by tanker and from Canada by pipeline. The largest ship to transfer oil to the Mobil refinery from its dock at Ferndale was 101,000 DWT. The largest fully loaded tanker which has docked at Mobil's dock is 63,000 DWT. The depth at dockside at the Mobil refinery is not greater than 45 feet. Mobil has publicly announced that it has plans under study, although no governmental approval has yet been sought or received, to expand its docking facilities to accommodate fully loaded tankers up to approximately 150,000 DWT.

B. Shell Oil Company's refinery located at Anacortes, Washington has a processing capacity of 91,000 barrels per day. Crude oil is supplied to it both by tanker and from Canada by pipeline. The largest ship to transfer oil to the Shell refinery from its dock at Anacortes was 78,000 DWT. The largest fully loaded tanker which has docked at Shell's dock is 64,500 DWT. The depth at dockside at the Shell refinery is not greater than 45 feet. Shell has publicly announced that it has plans under study, although

no governmental approval has yet been sought or received, to build a new docking facility with greater dockside depth at its Anacortes refinery to accommodate fully loaded tankers up to 200,000 DWT.

C. Texaco, Inc.'s refinery located at Anacortes, Washington has a processing capacity of 78,000 barrels per day. Crude oil is supplied to it both by tankers and from Canada by pipeline. The largest ship to transfer oil to the Texaco refinery from its dock at Anacortes was 98,500 DWT. The largest fully loaded tanker which has docked at Texaco's dock is 78,000 DWT. The depth at dockside at the Texaco refinery is not greater than 45 feet.

D. U.S. Oil & Refining Company's refinery located in Tacoma, Washington has a processing capacity of 18,500 barrels per day. Crude oil is supplied to it only by tanker. The largest ship to transfer oil to the U.S. Oil refinery from its dock at Tacoma was 103,000 DWT. The largest fully loaded tanker which has docked at U.S. Oil's dock is 45,000 DWT. The depth at dockside at the U.S. Oil refinery is not greater than 45 feet. U.S. Oil has under study, although no governmental approval has yet been sought or received, plans to extend its crude oil receiving pipeline from its present dock site in Blair Waterway, Tacoma, to the Port of Tacoma berth on Commencement Bay so that it may berth fully loaded tankers up to 125,000 DWT.

E. Sound Refining, Inc.'s refinery located at Tacoma, Washington has a processing capacity of 4,500 barrels per day. Crude oil is supplied to it only by tanker. The largest ship to transfer oil to the Sound refinery from its dock at Tacoma was 37,500 DWT. The largest fully loaded tanker which has docked at Sound's dock is 26,000 DWT. The depth at dockside at the Sound refinery is not greater than 32 feet.

20. In 1974, production of petroleum products by Washington refineries totaled approximately 300,000 barrels per day. Total consumption of petroleum products in Washington was approximately 189,000 barrels per day. Net exports of petroleum products totaled approximately 111,000 barrels per day, of which

approximately 46 percent were transported by barge or tanker. In December 1975, 93 percent of the tankers so employed were smaller than 40,000 DWT. The average size of these product tankers was 28,600 DWT.

21. The following table sets forth projections from 1977-1981 regarding production of crude oil from the Alaskan North Slope area as reported by the Maritime Administration in June 1975. Atlantic Richfield's share of this production and the aggregate share currently scheduled for delivery to Puget Sound refineries are as follows:

	(Barrels Per Day)		
	1977	1978	1981
Industry Total:	815,000	1,420,000	2,241,000
Puget Sound's Total Share:	122,250	213,000	336,150
Atlantic Richfield's Share:	149,000	260,000	448,000

It is currently anticipated that all the oil from Valdez, Alaska will be transported by tanker to ports on the West Coast. Current plans provide that 15 percent of all Alaskan oil will be transported to refineries in the Puget Sound area, and the remainder transported to San Francisco (40 percent) and Long Beach (45 percent). Of Atlantic Richfield's share, approximately 96,000 barrels per day for 1977, 1978 and 1981, respectively, are slated for the Cherry Point refinery.

22. The volume of oil to be moved from Alaska by tanker in 1980 will be more than 101 million short tons per year; the U.S. trade in crude oil by tanker between domestic ports in 1974 was 33 million short tons.

23. Four docking berths are under construction at the southern terminus of the Trans-Alaska Pipeline at Valdez, Alaska, which will accommodate fully loaded tankers up to 250,000 DWT. The depth at dockside will be no less than 75 feet and the berths

are scheduled to be completed in the summer of 1977. The Maritime Administration has estimated that approximately one-third of the tankers which will participate in the Alaska trade will be in excess of 125,000 DWT.

24. Atlantic Richfield intends to use the following vessels in the Alaska-West Coast trade: Sinclair Texas (50,000 DWT); Atlantic (Arco) Heritage (53,000 DWT); Arco Prudhoe Bay (70,000 DWT); Arco Sag River (70,000 DWT); Arco Anchorage (120,000 DWT); Arco Fairbanks (120,000 DWT); Arco Juneau (120,000 DWT); and two 150,000 DWT vessels not yet in service. Atlantic Richfield has contracted with the National Steel and Shipbuilding Company in San Diego, California to build the last two ships. (See Paragraphs 34 and 35). The 150,000 DWT vessels will have a 55-foot draft.<sup>4</sup>

25. Puget Sound is the only area on the West Coast of the United States south of Alaska containing a developed port with a controlling depth<sup>5</sup> sufficient to accommodate tankers with a fully loaded draft in excess of 55 feet without lightering, i.e., without unloading a portion of the cargo before entry into port. The Atlantic Richfield facility at Cherry Point is presently the only docking facility in Puget Sound designed to accommodate such tankers. There are presently, off the coast of California near Long Beach, mono-buoys capable of accommodating tankers, one of which can accommodate tankers with a draft of 56 feet. The controlling depth at Long Beach Harbor is presently 55 feet. Standard Oil Company of Ohio has publicly announced plans under study, although no governmental approval has yet been sought or received, to dredge at Long Beach to provide a controlling depth sufficient to accommodate tankers with a draft of more than 55 feet. In addition, two companies, Seadock, Inc. and Louisiana Offshore Oil Port, Inc., have sought approval from

<sup>4</sup>Deadweight tonnage is the primary determinant of draft (i.e., the distance the hull protrudes below the water), but a vessel's dimensions (e.g., length, width) also affect its draft.

<sup>5</sup>Controlling depth is defined as the maximum draft vessel that can enter the port at extreme low tide.

the federal government to build deepwater ports in the Gulf of Mexico capable of accommodating tankers in excess of 200,000 DWT.

26. The Northern Tier Pipeline Company has announced plans to construct an oil transfer terminal at Port Angeles, Washington capable of receiving tankers in excess of 125,000 DWT. The Port Angeles terminal would connect, via a submarine pipeline of approximately 1.5 miles, with a pipeline to be constructed around Puget Sound, east across the State of Washington and to refineries in the Midwest. Approval to build the terminal at Port Angeles has been sought, but not yet received, from the Washington Department of Ecology. Other necessary governmental approval, both for the terminal and the pipeline, has not yet been sought or received. Plans call for completion of the pipeline no earlier than June 1979 at an estimated cost of no less than \$1.5 billion. No financing plans have yet been announced. The Northern Tier Pipeline Company is also considering an alternative pipeline route to cross Puget Sound under Admiralty Inlet.

The Northern Tier Pipeline Company is a venture consisting, *inter alia*, of the Burlington Northern Railroad, the Michael J. Curran Pipeline Company, and Butler & Associates.

In addition to transporting oil to the Midwest, the pipeline would have the capacity to carry oil needed by Atlantic Richfield, Shell, Mobil and Texaco at their Puget Sound refineries, both as presently existing and as proposed to be expanded. Before these refineries could connect to the pipeline, construction of an additional pipeline of approximately 100 miles in length from the southern terminus of the Transmountain Pipeline at Anacortes, Washington, would be necessary. A right-of-way which might be used for a connecting pipeline presently exists in the form of the right-of-way owned by the Olympic Pipeline Company, which has a product pipeline running from Anacortes, Washington, to Portland, Oregon. Currently there are no plans for any such connecting pipeline, nor is it certain that any such connecting pipeline, if constructed, will obviate the necessity for continuing

to supply the refineries by tanker which would unload at the docking facilities at each refinery.

27. Atlantic Richfield has three other refineries in the United States at Carson, California; Houston, Texas; and Philadelphia, Pennsylvania. All of these are substantially supplied by tanker. The refinery at Carson, California is supplied by tanker through the Port of Long Beach.

28. The Port of Long Beach is capable of accommodating fully laden tankers in excess of 125,000 DWT. From March 1972 through 1975, eighteen tankers in excess of 125,000 DWT have served Atlantic Richfield's Carson refinery through the Port of Long Beach. At least six of these tankers were fully loaded. A list of the tankers by date, name, size and flag is contained in Exhibit F.

29. Atlantic Richfield has plans to modify the docking facilities serving its Philadelphia refinery to accommodate tankers of up to and including 150,000 DWT. These plans have received the necessary governmental approval. Atlantic Richfield is also planning a terminal at Bayport, Texas to accommodate tankers of this size to serve its Houston refinery. The necessary governmental approval has been sought but not yet received. Vessels of 150,000 DWT must be lightered before entry at both ports, both currently and after the planned modifications, because the controlling channel depths are 40 feet.

30. Atlantic Richfield operates directly or indirectly eleven seagoing U.S. flag tankers, as follows:

Arco Anchorage	(120,000 DWT)
Arco Fairbanks	(120,000 DWT)
Arco Juneau	(120,000 DWT)
Arco Prudhoe Bay	(70,000 DWT)
Arco Sag River	(70,000 DWT)
Arco Heritage	(53,000 DWT)
Sinclair Texas	(50,000 DWT)
Atlantic Prestige	(34,000 DWT)

Arco Endeavor	(32,000 DWT)
Arco Enterprise	(32,000 DWT)
Atlantic Trader	(21,000 DWT)

31. Atlantic Richfield also operates, directly or indirectly, three foreign flag tankers, as follows:

Arco Colombia	(58,000 DWT)
Atlantic Challenger	(51,000 DWT)
Arco Competitor	(51,000 DWT)

32. Seatrain owns or charters twelve (12) oil tankers which are available for or under charter to commercial shippers and governments for varying periods. Seatrain's current fleet includes six (6) tankers of U.S. registry and six (6) tankers registered under foreign flags. Four (4) of the vessels are prohibited from entering Puget Sound under the size prohibition of H.B. 527. Six (6) of Seatrain's tankers are under 40,000 DWT and not subject to H.B. 527. The four tankers over 125,000 DWT are chartered, foreign flag vessels. Seatrain does not believe it is economically feasible to reduce the size of its vessels of more than 125,000 DWT to comply with the provisions of H.B. 527. Seatrain has on occasion used some of its tankers for the carriage of cargo other than oil.

33. Mobil, Shell and Texaco, and each of them, both own and charter tankers in excess of 40,000 DWT. Each of such companies regularly uses such tankers to supply its Puget Sound refinery. Mobil, Shell and Texaco, and each of them, also both own and charter a substantial number of tankers in excess of 125,000 DWT, although none of such tankers was used, prior to H.B. 527, to supply such companies' Puget Sound refineries.

34. Atlantic Richfield has contracted with two different shipyards to build a total of five tankers. The National Steel and Shipbuilding Company (NASSCO) in San Diego, California has contracted to build two tankers of 150,000 DWT each. These tankers will be U.S. flag and will be used in service between Valdez, Alaska and West Coast ports. These vessels are currently

scheduled for delivery in 1979 and 1980. All main propulsion machinery has been ordered for the vessels, as has considerable ancillary equipment. Steel fabrication is scheduled to begin in December 1977 and August 1978. Mitsubishi Heavy Industries in Japan has contracted to construct three tankers, two of which will have a capacity of 151,000 DWT, the third a capacity of 120,000 DWT. These three tankers will be foreign flag and, although not eligible for coastwise trade, will be used to deliver foreign crude oil to Atlantic Richfield's United States refineries. These vessels are currently scheduled for delivery in 1977. Construction of the main engines for the two 151,000 DWT tankers has commenced. Steel fabrication has begun on one of these tankers and is expected to begin in July 1976 on the other.

35. The cost of construction of the two 150,000 DWT Atlantic Richfield tankers on order from NASSCO is approximately \$80 million each, or an aggregate of approximately \$160 million. The aggregate construction cost of the three Japanese tankers is approximately \$90 million. The aggregate construction cost of the five vessels is thus over \$250 million.

36. Shell Oil Company has contracted with National Steel and Shipbuilding Company in San Diego, California to build two 188,000 DWT tankers which Shell intends to use in the Alaska-West Coast oil trade. These tankers are scheduled to be delivered in late 1977 or early 1978. Steel for construction has been ordered, but construction has not yet begun.

37. In 1970, Seatrain entered into a lease with a 20-year term, under which it occupies and operates most of the shipbuilding facilities of the Brooklyn Navy Yard in New York. Seatrain decided to enter shipbuilding in anticipation of the completion of the Trans-Alaska Pipeline, which was expected to require vessels constructed in the United States for carriage of crude oil from the terminus of the pipeline to West Coast ports. Seatrain spent approximately \$35 million to modernize and equip the shipyard facility. More than 1,700 people are employed at the shipyard, about 80 percent of whom are members of minority racial groups. Seatrain's operation of the shipyard has been assisted by two federal agencies, the Economic Development

Administration and the Maritime Administration. The four 225,000 DWT tankers which have been or are under construction at the shipyard have been built with construction-differential subsidy. None of these vessels could be used under federal law to transport oil from Valdez to Puget Sound unless some or all of the subsidy is refunded.

38. Seatrain Shipbuilding Corp. presently has under construction two (2) 225,000 DWT oil tankers, the *T. T. Stuyvesant* and the *T. T. Bay Ridge*. Construction contracts for these vessels were executed on June 30, 1972 and June 30, 1973, and the vessels' keels were laid and construction commenced on October 26, 1973 and August 23, 1974, respectively. As of January 31, 1976, the vessels were approximately 90.6 percent and 44.9 percent completed and scheduled for completion at the end of calendar 1976 and 1977, respectively. The vessels are being built to meet all federal laws and standards, and international conventions, none of which would prevent them from entering Puget Sound. Both vessels will be prohibited from entering Puget Sound by the size prohibition of Section 3(1) of H.B. 527. Seatrain does not believe it is economically feasible at the present stage of construction, and does not plan, to reduce the size of the vessels to comply with the 125,000 DWT limit imposed by H.B. 527.

39. Seatrain presently has no sale or charter commitment for either the *Stuyvesant* or *Bay Ridge*. Seatrain's ability either to sell the vessels upon completion or employ them profitably will depend upon future economic factors, primary among these being the demand for U.S. flag tankers for the carriage of oil in the U.S. foreign and domestic trades. The estimated cost of construction for the *Stuyvesant* is \$87.5 million and \$89.2 million for the *Bay Ridge*.

40. Seatrain has considered the utilization of the *Stuyvesant* and the *Bay Ridge* for the carriage of oil while loaded to less than maximum capacity, which would reduce the draft, or by transferring oil to smaller vessels (lightering). Draft can be reduced to 55 feet by light loading these vessels, and vessels of that draft can presently be accommodated at Cherry Point. No current economic analysis of such operation has been made.

41. During the last five years, Atlantic Richfield has had delivered to it five new tankers. The following table sets forth the dates upon which contracts for construction were executed, fabrication commenced and delivery took place:

<b>Tanker</b>	<b>Contract Executed</b>	<b>Fabrication Started</b>	<b>Delivery Date</b>
Arco Anchorage (120,000 DWT)	Oct. 1969	Oct. 1971	June 1973
Arco Juneau (120,000 DWT)	Oct. 1969	Nov. 1972	May 1974
Arco Fairbanks (120,000 DWT)	Oct. 1969	March 1973	Aug. 1974
Arco Prudhoe Bay (70,000 DWT)	Nov. 1968	July 1970	Dec. 1971
Arco Sag River (70,000 DWT)	Nov. 1968	Nov. 1970	May 1972

42. At the present time, the following Atlantic Richfield vessels are enrolled and licensed.\*

Arco Prudhoe Bay	(70,000 DWT)
Arco Sag River	(70,000 DWT)
Arco Heritage	(53,000 DWT)
Sinclair Texas	(50,000 DWT)
Atlantic Prestige	(34,000 DWT)
Arco Endeavor	(32,000 DWT)
Arco Enterprise	(32,000 DWT)
Atlantic Trader	(21,000 DWT)

43. When the Trans-Alaska Pipeline System begins operation, most Atlantic Richfield vessels operating between Valdez and West Coast ports will be enrolled and licensed.

44. The world's petroleum consumption in 1973 was 2.76 billion tons. Of this, approximately 60 percent was transported by tanker. World trade in petroleum shipped by tanker averaged 30 to 35 million barrels per day.

\*Enrolled and licensed" refers to vessels engaged exclusively in domestic trade.  
See ¶ 135 *infra*.

45. Water transportation of petroleum and petroleum products, almost all by tanker, represented over 40 percent of all United States waterborne commerce in 1973 and 1974. Water transportation of petroleum and petroleum products represented 25 percent of all waterborne commerce in Washington in 1973 and 1974.

46. Water transportation of petroleum and petroleum products in Washington represented 2 percent of the total national water transportation of petroleum and petroleum products in 1973 and 1974.

47. The United States now imports over 35 percent of its oil requirements. More than 80 percent of the amounts imported are brought into this country by tanker. In 1974, U.S. imports of petroleum and petroleum products by tanker averaged 5.4 million barrels per day.

48. In 1974, imports of petroleum and petroleum products to Puget Sound by tanker averaged an estimated 129,000 barrels per day.

49. The economy of the State of Washington and the residents of Puget Sound are dependent on oil and the products produced from oil. No crude oil is produced in Washington and thus all crude oil and all products refined or derived from oil and consumed by Washington residents must either be imported or manufactured in Washington from imported crude oil.

50. As a result of the Arab Oil Embargo, which began in October of 1973 and continued to March, 1974, it has become a national goal of high priority to reduce American reliance on foreign petroleum supplies and attain domestic energy self-sufficiency. Nevertheless, it is likely that the United States will continue to import oil for the next decade. This oil, as well as oil from Alaska's North Slope, will be transported to the U.S. primarily by tanker.

51. It was reported by the Maritime Administration in December 1974 that 94 percent of U.S. oil imports were being transported in foreign flag tankers.

52. As of December 1975, there were 727 tankers over 125,000 DWT in the world fleet, with total capacity of 167 million DWT, constituting 59 percent of the total world capacity. There were an additional 344 vessels over 125,000 DWT on order or under construction, with total capacity of 88 million DWT. (That a vessel is "on order or under construction" does not, of course, mean that construction of the vessel will in fact be undertaken or completed, nor does the existence of such tankers in the world fleet mean that, absent H.B. 527, such vessels would be used in Puget Sound.) The world tanker fleet is registered in approximately 55 countries with Liberia accounting for 29 percent of the total tonnage in 1974. European maritime nations registered nearly 50 percent of world tanker tonnage in 1974 and the United States only 4 percent. Eleven percent of the world tanker tonnage was of Japanese registry.

53. As of December 1975, the world tanker fleet contained over 100 million DWT in surplus capacity, up from 60 million DWT in September 1975. Of that surplus capacity, 37.5 million DWT was laid up and inactive.

54. From September 1974 through November 1975, 172 tankers on order were cancelled. In November 1975 orders for 14 new tankers were cancelled, 7 of which were to be in excess of 125,000 DWT. Of the 172 cancellations, 131 were to be in excess of 100,000 DWT and 93 of those 131 were to be in excess of 200,000 DWT.

55. As of November 1, 1975, there were 249 tankers in the privately-owned U.S. flag tanker fleet, with total capacity of more than 9 million tons, approximately 3.4 percent of the total world capacity. Four U.S. flag tankers were over 125,000 DWT, as follows:

Massachusetts	265,000 DWT
Brooklyn	225,000 DWT

Williamsburg	225,000 DWT
Mobil Arctic	129,000 DWT
<hr/>	
Total Capacity	844,000 DWT

The four U.S. flag vessels over 125,000 DWT now in service presently carry crude oil from foreign ports to United States ports not located on Puget Sound. Atlantic Richfield Company does not presently intend to use any of these four vessels. Mobil Oil Company, however, intended prior to H.B. 527 to modify its dock facility as indicated in paragraph 19A *supra* and use the *Mobil Arctic* to deliver oil to its Ferndale refinery.

56. As of December 31, 1975, there were 54 U.S. flag tankers on order or under construction, with a total capacity of approximately 7.1 million DWT. Twenty-two (22) such ships, with an aggregate capacity of more than 5 million DWT, were larger than 125,000 DWT; 18 such ships, with an aggregate capacity of 1.6 million DWT, were between 40,000 DWT and 125,000 DWT; and 14 such ships, with an aggregate capacity of 472,900 DWT, were under 40,000 DWT.

57. The Merchant Marine Act of 1970, Pub. L. No. 91-469, 84 Stat. 1018, established a federal policy encouraging construction of U.S. flag vessels, including oil tankers, in United States shipyards in order to develop an American fleet able to compete in foreign trade. The announced goal of Congress was the construction of 300 vessels by 1980. Pursuant to this program, the federal government pays the difference in construction costs between tankers constructed in American and foreign shipyards, up to a maximum percentage (50% in 1970, now 35%). On December 1, 1975, 38 vessels, including 22 tankers, 9 of which were in excess of 125,000 DWT, were either on order or under construction pursuant to approved construction-differential contracts. The Maritime Administration reports that as of January 31, 1976, it has paid out more than \$347.6 million dollars on construction-differential subsidies for tankers under the Act. Nearly \$197 million of this amount has been paid for tankers in excess of 125,000 DWT. For tankers still on order or under

construction, the Maritime Administration has committed another \$252.9 million in subsidy funds, \$223.7 million of which is for tankers in excess of 125,000 DWT.

58. The following tankers were on order or under construction with the aid of the construction-differential subsidy as of December 1, 1975:

<b>Builder</b>	<b>DWT (each vessel)</b>
Bethlehem Steel Corp.	4      265,000
National Steel & Ship- bldg. Co.	6      89,700
	3      38,300
Newport News Shipbldg. & Dry Dock Co.	3      390,770
Seatrain Shipbldg. Co.	2      225,000
Todd Shipyards Co.	4      35,000
Total	22

None of these vessels could be used under federal law to transport oil from Valdez to Puget Sound unless some or all of said subsidy is refunded. Each vessel could, however, deliver oil from foreign ports to Puget Sound under federal law without refunding said subsidy.

59. Nine tankers had been constructed and delivered under the construction-differential subsidy program as of December 1, 1975, as follows:

<b>Builder</b>	<b>DWT (each vessel)</b>
National Steel & Shipbldg. Co.	3      38,300
	3      87,000
Seatrain Shipbldg. Co.	2      225,000
Bethlehem Steel Corp.	1      265,000
Total	9

None of these vessels could be used under federal law to transport oil from Valdez to Puget Sound unless some or all of said subsidy is refunded. Each vessel could, however, deliver oil from foreign ports to Puget Sound under federal law without refunding said subsidy.

60. The Merchant Marine Act of 1970 extends to tankers the operating-differential subsidy program established under the Merchant Marine Act of 1936 in 46 U.S.C. §§ 1171 *et seq.* This program seeks to equalize the disparity in operating costs between those of American ships and their foreign competitors. Only U.S.-flag tankers engaged in the foreign commerce of the United States qualify for the subsidy; the program does not cover vessels in interstate trade.

61. Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271-1280, as amended, authorizes the Secretary of Commerce to guarantee the payment of principal and interest on obligations made to finance the construction, reconstruction and reconditioning of vessels, including tankers, designed principally for research or for commercial use in the domestic or foreign trade of the U.S. Public Law No. 93-70, 87 Stat. 168, increased the limitation on the amount of outstanding obligations which may be guaranteed from \$3 billion to \$5 billion. As of June 30, 1975, \$4.2 billion in obligations were outstanding under the program. Of this amount \$1.1 billion involved tankers in operation (\$418 million), on order (\$198 million), or under construction (\$414 million). On the same date, applications were pending for \$667.5 million in loan guarantees for 13 tankers. Public Law No. 94-127, 89 Stat. 680 (1975), increases the limitation on the amount of outstanding obligations which may be guaranteed from \$5 billion to \$8 billion.

62. Seatrain's *T. T. Stuyvesant* and the *T. T. Bay Ridge* are being constructed with the assistance of construction-differential subsidies under the Merchant Marine Act. As of January 31, 1976, \$121 million has been expended on the construction of these vessels, of which \$37.5 million has been billed to the U.S. Government for construction-differential subsidy. In addition, Seatrain has received construction loan guarantees in excess of

\$64 million under Title XI of the Merchant Marine Act. During 1975, Seatrain Shipbuilding Corp. received loan guarantees totaling \$40 million from the Economic Development Administration to complete construction of the two vessels. These guarantees were made after analysis by the Maritime Administration of the economic justification for further investment in the partially constructed vessels. The Maritime Administration considered in this analysis the employment of the *Stuyvesant* and *Bay Ridge* in the carriage of crude oil in the Alaska-West Coast trade.

63. The Office of Technology Assessment of the United States Congress reports that U.S. shipyards have estimated that construction of a new tanker with a double bottom underneath all cargo tanks increases its construction costs by approximately 3 percent over a comparable tanker with a single bottom. The Office of Technology Assessment has estimated that construction of a new tanker with twin screws increases its cost by approximately 8 percent over a comparable tanker with a single screw.

64. Each of the tankers owned by Atlantic Richfield services more than one of its refineries. In planning the transport of crude oil to its refineries, Atlantic Richfield schedules tanker deliveries approximately three months in advance. Between the time of this scheduling and the arrival of the tanker, however, the refinery's needs may change for a variety of reasons, e.g., changes in demand for product or product mix, labor or operating difficulties at the refinery or vessel delays in loading or en route. In order to meet these changed needs efficiently, Atlantic Richfield may and frequently does change, after scheduling is completed and up to the time of actual delivery, either the destination of the tanker or the amount of crude oil to be off-loaded at a particular refinery. Atlantic Richfield also makes such schedule changes with vessels under charter except where the charter agreements do not permit.

65. Oil companies, including Atlantic Richfield, commonly engage in exchanges of crude oil and petroleum products with other oil companies for mutual economic advantage. These transactions, which occur on a worldwide basis, are of various types and include exchanges involving shipments entering and

leaving Puget Sound. Exchanges are undertaken, *inter alia*, to:

- a. Alleviate "spot" shortages and solve timing problems in the arrival of crude shipments at a refinery;
- b. Adjust the different grades and types of crude oil arriving at a refinery so that the refinery may operate at maximum efficiency; and
- c. Effect transportation savings by assuring that shipments of crude oil travel the shortest possible distance from the place of production to the refinery.

66. In most situations, the unit cost of transporting oil to refineries by larger tankers is lower than such transport by smaller tankers. For example, if a fully-loaded 75,000 DWT tanker is compared with a fully-loaded 150,000 DWT tanker, both constructed in the same shipyard, flying the same flag and having the same degree of modern features and automation, the 150,000 DWT tanker will be cheaper to construct and operate on a per barrel basis for the following reasons, *inter alia*:

- a. The crew required for each tanker will be approximately the same, i.e., approximately 28;
- b. The percentage increase in horsepower required to operate the larger vessel will be less than the percentage increase in tonnage;
- c. The cost of constructing and outfitting a 150,000 DWT tanker will be less than the cost of building two 75,000 DWT tankers; and
- d. The cost of maintaining a 150,000 DWT tanker will be less than the cost of maintaining two 75,000 DWT tankers.

67. The Maritime Administration's Office of Policy and Plans has estimated that the cost of shipping a barrel of oil from the

Persian Gulf to the United States on a 50,000 DWT tanker is \$2.00 to \$3.00; on a 250,000 DWT tanker, the cost is \$1.00 to \$1.50. The Oceanographic Commission of Washington has estimated that the cost of shipping a barrel of oil from the Middle East to Cherry Point on an 80,000 DWT tanker is approximately \$1.65; on a 120,000 DWT tanker \$1.40; on a 250,000 DWT tanker \$1.28.

68. Atlantic Richfield has estimated that the cost of transporting oil from Valdez, Alaska, to Cherry Point on comparably equipped tankers of 90,000 DWT, 120,000 DWT and 150,000 DWT is expected to be approximately \$.47 per barrel, \$.40 per barrel and \$.36 per barrel respectively. The Oceanographic Commission of Washington has estimated that the cost of transporting oil from Valdez, Alaska, to Cherry Point on comparably equipped tankers of 60,000 DWT, 120,000 DWT, and 250,000 DWT is approximately \$.376 per barrel, \$.282 per barrel, and \$.259 per barrel respectively.

69. In the world charter markets it is currently cheaper on a per-barrel basis to charter a 150,000 DWT tanker rather than a 120,000 DWT tanker for the Persian Gulf-Cherry Point trade. The present cost differential is approximately \$.094 per barrel.

70. The route usually taken by vessels traveling between the Pacific Ocean and Cherry Point or other Northern Puget Sound ports is to pass through the Strait of Juan de Fuca and into Puget Sound, then to turn north and pass through Rosario Strait. The route usually taken by vessels traveling between the Pacific Ocean and Vancouver or other Canadian ports in British Columbia is to pass through Haro Strait, rather than Rosario Strait. Both routes require transit through U.S. waters. The vessels retrace their paths on their return voyage to the Pacific Ocean. From the point where the vessel crosses the line between Discovery Island light and New Dungeness light to Cherry Point via Rosario Strait is a distance of 45 nautical miles, as shown on the navigational charts filed herewith as Exhibit G. While on this route, except while passing through Rosario Strait, vessels are instructed to proceed in separated traffic lanes pursuant to Coast Guard

regulations described in paragraphs 126-127 *infra* which establish a Vessel Traffic Control System (VTS) for Puget Sound. The traffic lanes are each 1,000 yards wide and are separated by 500 yard wide separation zones. The Coast Guard prohibits the passage of more than one 70,000 DWT vessel through Rosario Strait in either direction at any given time. During periods of bad weather, the size limitation is reduced to approximately 40,000 DWT. The minimum water depth is at least sixty feet at all points along this route. Tankers bound for southern Puget Sound ports such as Tacoma proceed through Admiralty Inlet in traffic lanes as shown on Exhibit G. The Puget Sound VTS includes radar coverage from Seattle north to the southern extreme of the San Juan Islands.

71. The portions of the Strait of Juan de Fuca, Rosario Strait, Haro Strait, Puget Sound and adjacent navigable waters located in the United States are navigable waters of the United States and sustain foreign and interstate commerce. Likewise, said portions are waters of the State of Washington.

72. The Canadian Coast Guard maintains a traffic control system under the authority of the Canadian Ministry of Transport, called the Vessel Traffic Management System, to enhance the safety of vessel traffic movement in Canadian waters. This system is voluntary and not all vessels comply. The Canadian Ministry of Transport has established a Vessel Traffic Management Center in West Vancouver, B.C. which administers the Vessel Traffic Management System (VTM) for the Vancouver traffic zone. The Vancouver traffic zone includes the western coastal waters of Canada east of Vancouver Island, including the Strait of Juan de Fuca and portions of Queen Charlotte Sound. By agreement between the Commandants in Vancouver and Seattle, the Canadian Coast Guard and the United States Coast Guard have established a system of information exchange to facilitate the purposes of their traffic systems. Pursuant to this agreement, the U.S. Puget Sound Vessel Traffic System (VTS) applies to traffic in the Strait of Juan de Fuca between the Pacific Ocean and Race Rocks, regardless of the international boundary line. This portion of the VTS is also voluntary and between 20 percent and 50 percent of all vessels comply. The Canadian VTM applies to Haro

Strait traffic, north and south-bound regardless of the international boundary. Likewise, the Canadian VTM applies to traffic in the Strait of Georgia south of the 49th parallel though most of the designated traffic lane is in U.S. waters. When using the VTS or VTM, Canadian-bound traffic utilizing the Rosario Strait transfers from the U.S. VTS to the Canadian VTM when abeam of Patos Island, though still in United States territorial waters. The Canadian VTM includes radar coverage in Vancouver Harbor.

73. Canadian oil refineries and distribution points are located near Vancouver, B.C. at North Burnaby (Chevron Oil, Inc.), Port Moody (Gulf Oil, Inc.), Ioco (Imperial Oil of Canada, Ltd.), and Shelburn (Shell Oil, Inc.). These petroleum facilities are normally reached from the Pacific Ocean through the Strait of Juan de Fuca only by passage through Puget Sound as defined by H.B. 527. Because petroleum refineries in British Columbia normally receive crude oil by pipeline from Canadian oil fields, carriage of crude oil by tanker to these facilities has been occasional and irregular. The parties are not aware of any traffic to these facilities by tankers in excess of 125,000 DWT and refined products from these facilities primarily have been transported in tankers of less than 40,000 DWT. Prior to passage of H.B. 527, tankers bound for Canadian ports through Haro Strait did not generally use pilots licensed by the State of Washington.

74. Atlantic Richfield has used state-licensed pilots on all tankers entering Puget Sound to the present time. When the Trans-Alaska Pipeline System begins operation, and Atlantic Richfield's vessels, sailing under enrollment, begin to make substantial numbers of voyages from Valdez to Cherry Point, Atlantic Richfield plans to have its masters qualify as federally-licensed pilots in Puget Sound. Atlantic Richfield has already taken steps to encourage its masters to obtain such federal licenses and one master of Atlantic Richfield's vessels has recently qualified as a federally-licensed pilot between Port Angeles and Cherry Point.

75. No tanker presently afloat has all of the design features necessary to satisfy the requirements of Section 3(2) of H.B. 527.

76. Neither Atlantic Richfield nor Seatrain presently has any tankers, whether owned or under long-term charter, which have (a) shaft horsepower in the ratio of one horsepower to each 2.5 DWT, or (b) twin screws, or (c) double bottoms underneath all oil and liquid cargo spaces. Some, but not all, of Atlantic Richfield's and Seatrain's tankers are equipped with collision-avoidance radar. Neither Atlantic Richfield nor Seatrain presently has plans to retrofit its tankers with all of the above features because such retrofit is not economically feasible under current and anticipated market conditions. The Seatrain vessels in the 225,000 DWT class, currently under construction, do not have requirements (a) through (c), above, but may include collision-avoidance radar.

77. The cost and use of tugboats prior to the effective date of H.B. 527 varied with their availability and location. Such tugs were used normally only for the immediate approach to and for docking and undocking from the Cherry Point and other oil terminals in Puget Sound. Since no tanker owned by or available to Atlantic Richfield has all of the features set forth in Section 3(2), it is necessary under H.B. 527 that tugboats now meet each oil carrying tanker in excess of 40,000 DWT as it enters Puget Sound from the Strait of Juan de Fuca and, if it is not fully unloaded at Cherry Point, escort it back to the Strait. This increased use of tugs increases the cost of tugboat service. The amount of such increase varies with the location and extent of usage of such tugs. The following table sets forth the tug fees paid directly by Atlantic Richfield for tankers which have called at the Cherry Point facility subsequent to the effective date of H.B. 527, the amount of such fees attributable to docking services, and the amount of such fees attributable to escort services required by H.B. 527:

Date(s)	Tanker	Docking & Escort		Total
		Undocking	Fee	
9/18-9/19/75	Arco Fairbanks	\$ 5,270	\$9,585	\$15,855
9/19-9/21/75	Kongshav	5,550	7,525	13,075
10/20/75	Arco Prudhoe Bay	2,800	8,680	11,480
10/24-10/26/75	Arco Anchorage (delayed)	11,620	9,110	20,370
10/30-11/2/75	Arco Juneau	5,710	4,870	10,580
12/8-12/9/75	Clementina	6,030	3,925	9,955
12/20-12/23/75	Arco Fairbanks	6,670	8,780	15,450

78. Since H.B. 527 became effective in September 1975, the average escort cost, the additional cost incurred as a result of the tug escort provision of H.B. 527, for tankers calling at Cherry Point as set forth in Paragraph 77 *supra* has been approximately \$7,500. If this added cost continues in accord with Atlantic Richfield's experience since the effective date of H.B. 527, additional tug fees attributable to H.B. 527 will total approximately \$277,500 per year. [\$7,500 (escort cost) x 37 (the number of ships in excess of 40,000 DWT calling at Cherry Point in 1975.)] Mathematically allocating the \$7,500 average additional cost for vessels of compliance with the tug escort provision of H.B. 527 to the barrels of oil carried on the vessels yields \$.0116 per barrel for a tanker of 90,000 DWT and \$.0087 per barrel for a tanker of 120,000 DWT.

79. To the present time, no reduction in the amount of oil processed at Puget Sound refineries has occurred as a result of the enactment of H.B. 527. All six oil companies operating refineries in Puget Sound presently supply their Puget Sound refineries using tankers of less than 125,000 DWT.

80. The total surface area of the State of Washington is approximately 44,590,080 acres. (A map of Washington is attached as Exhibit E.) Of this amount, approximately 1,984,000 acres or 4 percent are covered by marine waters. Puget Sound contains approximately 1,280,000 acres of these marine waters measured at mean high water.

81. Puget Sound is an estuary located in northwest Washington State as shown on Exhibit E. An estuary is defined as a semi-enclosed, coastal body of water which has free connection with the open sea and within which seawater is measurably diluted with freshwater derived from land drainage. Estuaries are zones of ecological transition between fresh and saltwater. There is water and light in the estuarine zone together with dissolved nutrients derived from both land and sea. Estuaries are generally productive habitats and serve as spawning grounds and/or nursery areas for many marine species. These species include animals and plants which live in the bottom, on the

bottom, in the water, on the water, and in marshes which border the estuary. Open water, eelgrass and tideflats provide food and shelter for migratory birds. In competition with fish and wildlife in the use of estuaries are recreational boating, fishing, beach walking, navigation, commerce and other uses.

82. The shoreline and bottom configuration of Puget Sound is irregular and characterized by many channels, bays and inlets. Numerous islands, marshes, tidal flats and narrow beaches are also characteristic of the Sound. Rivers and streams flowing from the Cascade and Olympic mountain ranges discharge into Puget Sound. The distinctive topography of the Sound, including its considerable depth, is primarily a result of glacial activity. This combination of characteristics is shared by three other large estuarine systems in the United States: Cook Inlet, Alaska; Prince William Sound, Alaska; and the Alexander Archipelago of southeast Alaska.

83. Puget Sound is inhabited by various forms of life. There are more than 2,000 different species located in or on the waters of Puget Sound or on immediate or adjacent uplands within one mile of Puget Sound. A listing of some of the species is set forth in Exhibit H, which also designates those species of commercial or recreational value.

84. Puget Sound is subject to a variety of weather conditions. Fog of varying intensity and duration occurs in the Puget Sound area, as set forth in Exhibit I, and on occasion substantially impedes visibility. Tidal currents are common to many areas of Puget Sound, as set forth in Exhibit IA. Wind conditions vary with time, season and location as set forth in Exhibit J; at Bellingham, for example, winds average approximately 5-10 miles per hour, although occasionally exceeding 30 miles per hour in winter. The hours of operation of fog horns in the Puget Sound area are set forth in Exhibit K.

85. Under the federal and state water pollution control laws, 80 percent of the waters of Puget Sound have been designated as potentially Class AA (extraordinary) quality; 18 percent as

potentially Class A (excellent) quality; 2 percent as potentially Class B (good); and 0.5 percent as potentially Class C (fair) quality. It has been estimated by the Washington State Department of Ecology that, at the present time, 89 percent of those waters designated as potentially Class AA actually meet present Class AA quality standards; 70 percent of Class A waters meet present Class A quality standards; 43 percent of Class B waters meet present Class B standards; and 33 percent of Class C waters meet present Class C standards. The definitions of these classes, together with their specific application to Puget Sound are set forth in Exhibit L.

86. The Washington Shoreline Management Act of 1971, R.C.W. ch. 90.58, is a comprehensive land and water use planning statute affecting substantially all salt and fresh water areas and adjacent lands in Washington. Under the statute, local governments may originate use and development plans for all affected areas in accordance with guidelines developed by the state; if a local government does not act, the state will do so. Certain areas are defined in the statute as "shorelines of statewide significance". In the event of a dispute between the affected local government and the state with respect to "shorelines of statewide significance," the state plan prevails.

"Shorelines of statewide significance" within the meaning of the statute include all tidelands adjoining the Pacific Ocean and certain designated tidelands adjoining the Strait of Juan de Fuca and Puget Sound, all natural and artificial lakes of 1,000 acres or more, most substantial rivers and streams in Washington, and 200 feet of upland adjacent to such tidelands, lakes, rivers and streams. The term also includes all of the beds of the Strait of Juan de Fuca, the Pacific Ocean and Puget Sound lying seaward of the lowest line on the land reached by the receding tide. Eleven percent of the tidelands and adjacent uplands, constituting ~~wetlands~~<sup>7</sup> of Puget Sound are shorelines of statewide significance.

<sup>7</sup>Wetlands are defined in the Washington statute as "those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all marshes, bogs, swamps,

87. The bays, channels, salt water marshes, and inland waters of Puget Sound provide habitats for many species of finfish and shellfish. Fish packing and canning are industries in the Puget Sound area. The total annual contribution of the Puget Sound fishery to Washington State economic activity has been estimated by the State of Washington to have been \$170 million in 1973. This figure includes indirect expenditures (e.g., for construction, transportation) as well as direct expenditures (e.g., for canning and packing). This figure also includes those amounts set forth below in paragraphs 88 and 89.

88. There are approximately 213 species of finfish inhabiting Puget Sound. These species are set forth in Exhibit H. Of these, approximately 81 are of commercial or recreational value. Examples of these species are salmon, steelhead, herring, smelt, lingcod. In 1973, the commercial catch of finfish in Puget Sound was valued by the State of Washington at approximately \$36.3 million. In 1973 the sports catch of finfish in Puget Sound was valued by the State of Washington at approximately \$10.4 million. Finfish habitat, commercial finfishing areas, and sports finfishing areas are set forth in Exhibit M.

89. There are 327 species of shellfish and other marine invertebrates inhabiting Puget Sound. These species are set forth in Exhibit H. Of these, approximately 46 are of commercial or recreational value. Examples of these species are Dungeness crab, Olympia oyster, Pacific oyster, Manila clam, geoduck, octopus, and butter clam. The commercial shellfish catch in Puget Sound was valued by the State of Washington at approximately \$3.1 million in 1973. The sports shellfish catch was valued by the State of Washington at approximately \$450,000 in 1973. Shellfish habitats, commercial shellfishery areas and sports shellfishery areas of Puget Sound are set forth in Exhibit M.

and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology: *Provided*, That any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom; \* \* \* "R.C.W. § 90.58.030 (2)(f) (Supp. 1975).

90. In 1975 the Washington State Department of Fisheries issued eight permits for salmon rearing in Puget Sound. In the same year the Department issued 264 licenses (\$15 each) for commercial clam and oyster farms, most of which were for Puget Sound farms. Washington aquaculture corporations employed in 1975 an estimated 1250-1500 people on Puget Sound. Approximately 5 miles south of Cherry Point is Lummi Bay, the site of the Lummi Indian Tribe aquaculture program, which is primarily concerned with the propagation and sale of silver salmon, King salmon, steelhead, trout, and oysters. The federal government has expended a total of \$3.4 million on behalf of the aquaculture program of the tribe. The operating expense of the project in 1974 was approximately \$1 million.

91. Puget Sound is inhabited by various species of marine mammals, including river otter, harbor seal, northern sea lion, harbor porpoise, killer whale and pilot whale as set forth in Exhibit H.

92. There are approximately 127 species of birds which inhabit, including those which migrate or winter in, the coastal areas of Puget Sound. These species are listed in Exhibit H. Of these, approximately 21 are of recreational importance to hunters. Examples of these species are snow goose, mallard, widgeon, canvas back, scaup, and goldeneye. Waterfowl are hunted in and near Puget Sound. In 1973 the State of Washington estimated the value of the sports kill of ducks and geese in and near Puget Sound was approximately \$1.1 million. Puget Sound is a wintering area for waterfowl from Alaska, western Canada and eastern Russia, and for other birds.

93. It is unknown how many, beyond a de minimis number, or to what extent, beyond a de minimis amount, finfish, shellfish, marine mammals or birds in and around Puget Sound would be affected adversely by an oil spill. Any such effect would depend upon variables such as the amount and type of oil spilled, the location of the spill, the success of efforts to contain or clean up the oil and the prevailing weather and water conditions at the time and thereafter. The possible effects of an oil spill are discussed in paragraph 108 *infra*.

94. The beds of Puget Sound (that area below extreme low tide), the tidelands of Puget Sound (that area between extreme low tide and the line of vegetation or mean high tide) and the waterfront lands adjacent thereto (excluding industrial, commercial and residential improvements of any type) have a value which is extremely difficult to quantify, but which has been estimated by the State of Washington to be in excess of \$2 billion.

95. The waters of Puget Sound support various recreational activities such as boating, swimming, water skiing and skin diving. The U.S. Army Corps of Engineers and Bureau of Outdoor Recreation estimated in 1968 that more than 30 percent of the residents of the 12 counties adjacent to Puget Sound engaged in some form of recreational boating. The State of Washington has estimated that more than \$125.4 million were spent on boating activities in the Puget Sound area in 1972. (This figure includes purchases of boats, engines, trailers, accessories, docking and fuel.)

96. Nearly all of the beds of Puget Sound are owned by the State of Washington. Of the 2,095 miles of tideland frontage of Puget Sound, approximately 43 percent are owned by the State of Washington.

97. The population of the State of Washington was approximately 3,448,100 in the year 1974. Approximately 65 percent (or 2,241,300) of the residents of the State of Washington reside in the 12 counties which border Puget Sound. Of these, approximately 1,794,000 reside in the Everett-Seattle-Tacoma metropolitan area.

98. Many portions of Puget Sound are beautiful, i.e., aesthetically pleasing to the human eye. Although not quantifiable in dollar terms, it has obvious aesthetic values.

99. It is unknown to what extent, beyond a de minimis amount, beds, tidelands, waterfront uplands or other real or personal property would be affected adversely by an oil spill. Any

such effort would depend upon variables such as the amount and type of oil spilled, the location of the spill, the success of efforts to contain or clean up the oil and the prevailing weather and water conditions at the time and thereafter. The possible effects of an oil spill are discussed in paragraph 108 *infra*.

100. Puget Sound is the site of a number of fish and wildlife preserves and refuges. The federal government operates 13 wildlife preserves or refuges in or bordering on Puget Sound. These 13 preserves comprise 2,300 acres. The State of Washington operates two oyster preserves on Puget Sound, comprising 12,000 acres. The Nature Conservancy, a private wildlife conservancy organization, operates four bird refuges or preserves in the Puget Sound area; these refuges comprise 384 acres. One of these, Foulweather Bluff, is located on Hood Canal. The other three, Waldron Island, Deadman Island and Goose Island, are located in the San Juan Islands.

101. There are presently 158 federal, state, county and local public parks or recreation sites located on or abutting Puget Sound. A list of these parks and state park visitations are found in Exhibit N. Privately operated parks and recreation sites are also found on Puget Sound.

102. The State of Washington estimates that in 1973 approximately 4.5 million person nights and \$92.1 million were spent by tourists in the 12 counties adjacent to Puget Sound. It is difficult to ascertain the purpose of such visits or the activities in which such tourists engage, but Puget Sound attracts and is used by many of these tourists.

103. The Washington State Ferry System operates daily 11 major ferry routes to and from points on Puget Sound. Besides being used as a means of transportation by residents, the state ferry system serves as an attraction and transportation for tourists in Puget Sound.

104. Puget Sound functions as an area for the conduct of scientific research and educational programs. The University of Washington operates a marine station at Friday Harbor, on San

Juan Island, at which the University conducts research and educational programs. More than \$1 million is spent annually on the University's Institute for Marine Studies at Friday Harbor. Western Washington State College (Bellingham) operates a marine station at Shannon Point, near Anacortes. Walla Walla College maintains a similar facility at Deception Pass, near Anacortes. Other institutions of higher education in Washington, including the University of Puget Sound (Tacoma) and Evergreen State College (Olympia), also conduct scientific research and educational programs on or pertaining to Puget Sound. The State of Washington, through its Department of Ecology, Department of Fisheries, Department of Game and Department of Natural Resources, among other state departments and agencies, conducts research on Puget Sound and operates a number of marine stations. Research is also conducted by local and municipal agencies and private parties. Research is also conducted on Puget Sound by the National Oceanographic and Atmospheric Administration (NOAA), whose Northwest Regional Headquarters is located in Seattle.

105. Puget Sound is a water resource subject to many competing uses, as set forth in paragraphs 83 through 104 and 118, some of which adversely affect the availability and desirability of this water resource for other such uses.

106. In gross, the waters, beds and tidelands of Puget Sound are more extensive and economically significant than other non-Pacific Ocean marine water bodies in the State of Washington.

107. The Oceanographic Commission of Washington reported in January 1975 on three sites located west of Puget Sound within the State of Washington (and therefore not subject to the provisions of H.B. 527) which it considered reasonably developable as port sites capable of receiving tankers in excess of 125,000 DWT. Facilities to receive tankers in excess of 125,000 DWT do not presently exist at any of the reported sites. Except as set forth in Paragraph 26 *supra*, no governmental approval has either been sought or received for construction of such facilities.

108a. Oil spilled into Puget Sound has a significant potential for causing injury or death to biota which live in, on and adjacent to the waters of Puget Sound, such as waterfowl, marine mammals and other marine organisms. It also has a significant potential for damaging real and personal property, both publicly and privately owned, which underlies, is within, or borders upon the waters of Puget Sound. It may also restrict the availability of the waters and beaches of Puget Sound for public use.

b. The greater the amount of oil spilled into the waters of Puget Sound the greater the potential for causing injury, death or damage as stated in paragraph 108(a) *supra*.

c. The potential for injury, death or damage as described in paragraph 108(a) *supra* arising from oil spilled into the waters of Puget Sound varies based upon a number of factors including, among others, the:

1. Amount of oil spilled
2. Location of the oil spill
3. Type of oil spilled
4. Temperature of the water
5. Temperature of the air
6. Wind and other weather conditions
7. Water currents
8. Tidal level
9. Season of the year
10. Capability of humans to clean up oil
11. Response time
12. Coordination and cooperation between various clean-up participants — private and public.

109. The National Academy of Sciences in its recent report entitled "Petroleum in the Marine Environment" concluded with respect to the effects of oil spills, as follows:

"A review of the literature (Table 4-1) shows that a limited number of documented studies exist that consider the biological, chemical, and physical acute and long-term effects of oil in the marine environment. Because most studies have been made in estuaries, little data are available concerning effects on the open ocean. However, certain generalizations

about various aspects of oil in the marine environment can be made.

"Whereas the concentration of petroleum hydrocarbons dissolved in water is generally low (10 ppb) (Gordon and Prouse, in press), it was found to be much higher in sediments, ranging from 1,500 to 5,700 ppm in polluted coastal sediments (natural indigenous hydrocarbons in sediments in nearly unpolluted areas ranged from 26 to 130 ppm). On the outer coastal shelf, concentration in sediments might be as high as 20 ppm, whereas in the deep ocean 1-4 ppm was the usual concentration (Farrington and Medeiros, personal communication; Farrington and Quinn, 1973; Blumer and Sass, 1972b).

"In general, where damage was severe, the oil spill was massive relative to the size of the affected area, and the spill was confined naturally or artificially to a limited area of relatively shallow water for a period of several days. Deleterious effects may have been increased by storms or heavy surf water mixed with oil and sediments in the affected area. These effects were also generally localized, ranging from a few miles to tens of miles, depending on ecological and environmental circumstances; however, for a given quantity of oil, the more localized the distribution of the spill, the greater is the mortality.

"Different oils were found to have different effects, with toxicity being most pronounced for refined distillates and physical smothering most severe with viscous crude oils or Bunker C crude oil. Refined No. 2 fuel oil was among the oils having the most toxic effects. Variations in physical environment in coastal areas were also considered in determining effects; i.e., a polluted area might experience sudden and unpredictable stresses from synergistic interactions between variable environmental factors and the oil.

"The amount of oil and the type of organism afflicted was also found to be important. For example, a single coating of fresh or weathered crude oil or its derivatives on certain bird species or on seeds of plants caused death, whereas marsh plants were killed only after several coatings. In general, emergent plant life was less likely to be affected than marine biota, unless the spill occurred in tropical waters where mangroves were present. Very low concentrations of the soluble fractions of kerosene interfered with searching behavior of a marine snail. Crude oil on the shells of oysters had no effects. The photosynthesis of marine phytoplankton was reported to be reduced by 100 ppb of No. 2 fuel oil. Mortality of some organisms has been found in all major spills for which studies have been published, with the pelagic diving

birds being the most obvious casualties. The extent of the mortality depended on local conditions and was greatest when the releases of oil were confined to inshore areas where natural marine resources were abundant. Intertidal organisms tended to be more resistant to stress than subtidal species. In one instance, where the herbivores were reduced, the intertidal plants on which they fed increased markedly. In laboratory studies where organisms were near their limits of tolerance to temperature or salinity, pollution products caused a much greater change in metabolic rates than when the physical conditions were nearer optimum.

"The recovery of polluted areas varies greatly, depending on the flushing of the polluted area, the type of the sediments on the substrata, and the degree of isolation of its ecosystems and the kinds of organism that form them. The time periods for recovery may vary from a few months to several years. In general, the initial stages of recovery are characterized by opportunistic species that are often very productive, with a much longer time required to restore the community to one that supports more long-lived species.

"One characteristic of organisms composing an ecological community that may affect its stability and rate of recovery is, for example, a slow rate of reproduction or growth. Such a characteristic increases the vulnerability of a species or ecological community to damage from oil or any other pollution. Some marine birds (auks and penguins, particularly) have very slow reproductive rates, usually only one egg per year. With the normally low rate of mortality it takes about 50 years for the population to double; thus, even if oilings were widely spaced in time, they would be chronic catastrophes to auks. Such animals might never recover from a series of spills.

"Marshes or estuaries, well-isolated from each other, as they are on steep coastlines such as the West Coast of the United States, provide a measure of the effects of isolation. Certain common species that live only in brackish regions of estuaries have plankton larvae. If these drifted passively in the current, they would be washed out into the open sea and lost; instead, they dive deeper after drifting toward the mouth of the estuary and are carried by the deeper currents back up to where they were spawned in the brackish regions (Bousfield, personal communication). Thus, if the estuary is an isolated one, almost all the recruitment of these organisms is from the offspring of the resident population. If this population were completely destroyed by pollution, recolonization by chance immigration from a distant estuary would probably take a very long time. The resident population

of estuaries provides shelter and food for the young stages of many commercially important marine organisms (shrimp, fish, etc.).

"Partly because of their isolation, the ecological communities of coastal marshes and estuaries are particularly vulnerable to the activities associated with petroleum exploration and production. The dredging to install rigs and pipelines may severely alter an estuary, and changes in the hydrology that bring about a greater incursion of higher salinity water may have severe effects on the aquatic life attuned to a given amount of salinity. For example, the increase in salinity may greatly decrease the yield of oysters per acre. In Louisiana the overall yield of oysters and shrimp has not changed much, but dredging, channelization, and other activities have so altered the marshes that the oyster industry has been forced to move into less favorable habitats, with a consequent decline in the yield per hectare [sic] since 1945. At the same time, the species composition of the shrimp catch has changed: The white shrimp declined from 96 to 50 percent of the catch, while brown shrimp increased to about 50 percent. Such changes in shrimp species are often associated with changes in the salinity of the water.

"There is very little data on the effect of oil on pelagic species. Without more research, it is clearly premature to conclude anything about the effects of oil on the open ocean.

"Conclusions regarding the effects of oil in the marine environment on human health are based on limited information. From our interpretation of this information, modest concern rather than alarm appears to be justified. Although it is known that petroleum contains small amounts of carcinogens and possibly small amounts of other harmful materials, the amounts of carcinogens known to be in petroleum that could be ingested by eating marine organisms is estimated to be no greater than that acquired from eating any other foods. Nonetheless, to reduce potentially harmful effects to man, all sources of carcinogens, including the large source from terrestrial activities, should be investigated and, if possible, eliminated.

"The field of carcinogens and man's exposure to them needs more research. As part of this research, more studies should be performed to determine how these materials enter the ocean and, subsequently, man. Studies to detect whether there are other materials in petroleum in small quantities, such as mutagens or teratogens, are also needed because such enormous amounts of petroleum are used and handled by man. At present, the admittedly very inadequate available

evidence does not make it appear that dangers of this sort from petroleum in the sea are nearly as great as other exposures to man of carcinogenic and toxic materials."

110. Known tanker collisions and other casualties in Puget Sound during the period 1941 to 1973 are set forth in Exhibit O.

111. Known oil spills in Puget Sound since 1971 are set forth in Exhibit P.

112. Although tankers of the same deadweight tonnage vary substantially in dimensions and operating characteristics, the following table sets forth designs used by the United States at the 1973 International Conference on Marine Pollution:

<b>Deadweight (DWT)</b>	21,000	75,000	120,000	190,000	250,000
<b>Displacement</b>	26,700	90,700	145,300	220,500	286,600
<b>Length</b>	528'	763'	850'	1,000'	1,085'
<b>Breadth</b>	77'	125'	138'	155'	170'
<b>Depth</b>	40'	54'	68'	82'	84'
<b>Draft</b>	31'	41'	52'	61'	65'
<b>Maximum Ahead Horsepower*</b>	7,200	19,000	26,000	30,000	32,000
<b>Number of Separate Cargo Tanks</b>	18	14	13	13	18
<b>Volume of Single Typical Center Tank<sup>b</sup></b>	1,800m <sup>3</sup>	7,500m <sup>3</sup>	14,000m <sup>3</sup>	17,000m <sup>3</sup>	30,000m <sup>3</sup>
<b>Volume of Single Typical Wing Tank</b>	900m <sup>3</sup>	4,700m <sup>3</sup>	8,700m <sup>3</sup>	10,500m <sup>3</sup>	15,000m <sup>3</sup>
<b>Horsepower to Displacement Ratio</b>	0.27	0.21	0.18	0.135	0.11
<b>Stopping Distance, 16 Knots</b>	6,000'	10,500'	13,000'	17,000'	20,000'
<b>Stopping Distance, 6 Knots</b>	1,500'	2,500'	3,000'	3,600'	4,000'

\*Astern horsepower (maximum) ranges 30% to 40% of the maximum ahead horsepower.

<sup>b</sup>One cubic meter equals approximately 6.3 barrels.

<sup>c</sup>This term refers to unexpected or undesired events such as breakdowns, collisions, groundings, fire and explosions. A collision between two tankers is reported here as two accidents.

113. The amount of oil discharged as a result of a tanker accident which results in a spill may vary widely, e.g., from tens or hundreds of gallons to thousands of tons. In the year immediately preceding enactment of H.B. 527 in May 1975, three tanker polluting incidents of major proportion occurred worldwide: in August, 1974, the 206,000 DWT *Metula* ran aground in the Strait of Magellan, resulting in a loss of approximately 50,000 tons of oil; in January, 1975, the 237,000 DWT *Showa Maru* struck a reef in the Strait of Malacca, spilling approximately 4,500 tons of oil; and in January, 1975, the 88,000 DWT *Jakob Maersk* ran aground off Oporto, Portugal, and lost its entire cargo, either by spillage into the ocean or fire.

114. The following table summarizes tanker accidents<sup>10</sup> and resulting spills involving all tankers in excess of 3,000 DWT, both worldwide and within the United States, for the past five years. The U.S. Coast Guard reports that tanker accidents contribute 200,000 tons per year of oil (petroleum in any form) input to the oceans worldwide. The Coast Guard also reports that tanker accidents within 50 miles of the U.S. coast have been estimated to contribute spillage of over 12,000 tons per year during the past five years.

WORLD WIDE ACCIDENTS  
1969-73

	All Tankers Greater Than 3,000 DWT	Tankers 40,000 To 120,000 DWT	Tankers Greater Than 120,000 DWT
Total number of accidents:	3,183	1,341	161
Total number of accidents causing pollution:	452	164	29
Total oil spilled in these accidents (tons):	951,317	404,992	158,403

**Accidents in U.S. Waters within  
50 Miles of Shore  
1969-73**

Total number of accidents:	1,106	N.A.	N.A.
Total number of accidents causing pollution:	91	N.A.	N.A.
Total oil spilled in these accidents (tons):	63,147	N.A.	N.A.

The U.S. Coast Guard studies of worldwide tanker accidents for 1969-73 show little change in annual averages. Historically, a few major accidents each year have been the principal contributors to oil outflow.

115. Oil enters the marine environment from many different sources. Although the rate at which crude petroleum and its by-products are actually entering the ocean is impossible to determine with complete accuracy, the following table shows major sources and estimated amounts of petroleum hydrocarbons entering the world's oceans annually:

Source	Best Estimate (Metric Tons Per Year)
Natural seeps	600,000
Offshore production	80,000
Transportation:	
LOT <sup>11</sup> tankers	310,000
Non-LOT tankers	770,000
Drydocking	250,000
Terminal operations	3,000

<sup>11</sup>LOT (Load on Top) refers to a method of ballasting and tank washing whereby oily water left in tanks is not pumped directly overboard, but instead is diverted to slop tanks where it is held while the oil and water are separated by gravity. The water is pumped overboard, leaving the oil in the slop tank. New cargo oil is loaded on top of this retained oil.

Bilge/bunkering <sup>12</sup>	500,000
Tanker accidents	200,000
Nontanker accidents	100,000
Coastal refineries	200,000
Atmosphere	600,000
Coastal municipal waste	300,000
Coastal nonrefining, industrial wastes	300,000
Urban runoff	300,000
River runoff	1,600,000
<b>Total</b>	<b>6,113,000</b>

116. There are some private and public cleanup materials and equipment in or accessible to the Puget Sound area in the event of an oil spill.

117. The success and the cost of oil spill cleanup efforts depends on a number of variables as referred to in paragraph 108(c) *supra*. The average cost per gallon for oil spill cleanup operations in Puget Sound has been estimated by the Washington Department of Ecology, as follows:

Size of Spill (Gallons)	Average Cleanup Cost Per Gallon	Number of Spills From Which Average is Obtained
0—100	\$19.36	6
100—1000	5.26	3
1000—10000	3.67	5

<sup>12</sup>Bilge/bunkering refers to discharges at regular intervals of oily wastewater which collects in the inner bottom of the ship (the bilges) and discharges which occur during refueling operations.

There has been one spill in Puget Sound of approximately 20,000 gallons. The cleanup cost for this spill was in excess of \$50,000. It is not known whether oil spills of about 20,000 gallons and greater in Puget Sound can be cleaned up with existing capabilities without significant damage to public and private property first taking place.

118. For the express purpose of directly protecting and enhancing the water quality of Puget Sound and its tributaries, including Lake Washington, the federal, state and local governments have expended at least \$503 million on municipal wastewater treatment facilities since 1956. In addition, private corporations have expended at least \$52 million for facilities at pulp and paper mills to improve the quality of direct discharges into Puget Sound. Effluents from municipal and industrial wastewater treatment plants and dredged materials are the three major authorized sources of wastes currently discharged into Puget Sound. The Washington Department of Ecology has estimated that the total flow of all discharges from all authorized sources is 665 million gallons per day.

119. Experts differ and there is good faith dispute as to whether the movement of oil by a smaller number of tankers in excess of 125,000 DWT in Puget Sound poses an increased risk of oil spillage compared to the risk from movement of a similar amount of oil by a larger number of smaller tankers in Puget Sound.

120. Experts differ and there is good faith dispute as to whether use of a tugboat escort with aggregate shaft horsepower equal to 5 percent of the DWT of the tanker reduces the likelihood of spills in Puget Sound.

121. Experts differ and there is good faith dispute as to the efficacy in preventing oil spills of (a) minimum shaft horsepower of one h.p. for each 2½ DWT; (b) twin screws; (c) double bottoms underneath all oil and liquid cargo spaces; (d) two radars, one of which must be collision-avoidance radar.

### **III. NONEXCLUSIVE LIST OF STATUTES, REGULATIONS AND INTERNATIONAL AGREEMENTS**

#### **FEDERAL STATUTES AND REGULATIONS**

122. The primary federal statute on which Plaintiffs base their preemption contentions is the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424 (July 10, 1972) ("PWSA"), codified at 33 U.S.C. §§ 1221 *et seq.* and 46 U.S.C. § 391a. A true copy of the Act is annexed to the complaint as Appendix II and filed herewith as Exhibit Q.

123. The Secretary of Transportation had delegated his rulemaking authority under the PWSA to the Commandant of the Coast Guard. 49 C.F.R. § 1.46(n)(4) (1975).

124. In the exercise of its authority under Title I of the PWSA, the Coast Guard has promulgated certain regulations governing the powers of the Captains of Port and District Commanders. 40 Fed. Reg. 6653 (Feb. 13, 1975), 33 C.F.R. Part 160. A true copy is filed herewith as Exhibit R.

125. In the exercise of its authority under Title I of the PWSA, the Coast Guard announced in an advance notice of proposed rulemaking, that it has under consideration additional proposed regulations. 39 Fed. Reg. 24157 (June 28, 1974). A true copy is filed herewith as Exhibit S. To date, the text of such proposed regulations has not been published.

126. In the exercise of its authority under Title I of the PWSA, the Coast Guard has promulgated regulations establishing a vessel traffic control system in Puget Sound. 39 Fed. Reg. 25430 (July 10, 1974), 33 C.F.R. Part 161, Subpart B. A true copy is filed herewith as Exhibit T.

127. In connection with such vessel traffic system, the Coast Guard has promulgated an operating manual dated September 1974. A true copy is filed herewith as Exhibit U.

128. In the exercise of its authority under Title II of the PWSA, the Coast Guard has promulgated certain regulations for protection of the marine environment with respect to design, equipment and operating requirements for tankers in interstate trade:

(a) 40 Fed. Reg. 48280 (October 14, 1975), 33 C.F.R. Part 157, a true copy of which is filed herewith as Exhibit V; and

(b) 41 Fed. Reg. 1479 (January 8, 1976), amending 33 C.F.R. Part 157, a true copy of which is filed herewith as Exhibit W.

129. The Coast Guard has published a Final Environmental Impact Statement dated August 15, 1975, with respect to such regulations. A true copy is filed herewith as Exhibit X. This document is offered for the purpose of showing the steps taken and the matters considered by the Coast Guard in the exercise of its authority under the PWSA and pursuant to the requirements of the National Environmental Policy Act of 1969, and not for the truth of the substantive conclusions stated therein.

130. Section 7(C) of Title II of the PWSA directs that regulations for protection of the marine environment with respect to design, equipment, and operating requirements for tankers engaged in foreign commerce be effective not later than January 1, 1976. The Coast Guard has announced its intention to promulgate regulations for U.S. flag vessels in foreign trade identical to those for vessels in interstate trade. 40 Fed. Reg. 48280 (October 14, 1975). To date, the Coast Guard has neither formally proposed nor promulgated regulations to implement this provision.

131. On January 21, 1976, Governor Evans wrote a letter to President Gerald R. Ford requesting that the President direct the Coast Guard and Maritime Administration to exercise their regulatory powers and require that all U.S. tankers be built with double bottoms, inert gas systems, segregated ballast systems,

collision avoidance radar, Loran-C systems and any other safety devices readily available to the industry. In addition, he suggested that any tanker designed for use where tug assistance is unavailable should be equipped with bow thrusters. A true copy of the letter is filed herewith as Exhibit Y.

131A. On March 2, 1976, Governor Evans submitted written testimony to the U.S. Senate Committee on Commerce. A true copy of this testimony is filed herewith as a part of Exhibit Y. This document is offered for the purpose of showing the position taken by Governor Evans and not for the truth of the substantive conclusions stated therein. Other witnesses at such hearings, including the Coast Guard, took positions in particular respects different from those espoused by Governor Evans.

132. Pursuant to the provisions of Title 46, Chapter 14 of the United States Code, 46 U.S.C. §§ 361-445, the Coast Guard is responsible for inspecting all "steam vessels", including tankers, to assure that they comply with applicable federal regulations. Regulations promulgated by the Coast Guard relating to vessel design, equipment, and inspection are codified generally in Title 46 of the Code of Federal Regulations.

133. Pursuant to the Tank Vessel Act, 49 Stat. 1889, 46 U.S.C. § 391a, as amended by Title II of the PWSA, the Coast Guard is responsible for inspecting tankers to assure that they comply with all federal regulations for vessel safety and protection of the marine environment, and issuing complying tankers a certificate of inspection, upon which must be endorsed a permit showing the kinds of cargo the tanker is authorized to transport. Regulations promulgated by the Coast Guard relating to tanker design, equipment and inspection are set out in Subchapter D of Title 46 of the Code of Federal Regulations. The Coast Guard recently promulgated amendments to such regulations relating to structural fire protection and gas inerting system requirements, 41 Fed. Reg. 3838 (January 25, 1976), 46 C.F.R. Parts 30, 32, 34, a true copy of which is filed herewith as Exhibit Z.

134. Several bills to amend the Tank Vessel Act to require particular design features have been introduced in the current session of Congress, including the following:

a. S. 333 which would require segregated ballast tanks and double bottoms on all tankers over 20,000 DWT carrying oil to United States ports situated on internal waters or straits;

b. H.R. 6091 which would require segregated ballast tanks, double bottoms, and if necessary, double sides on all tankers over 20,000 DWT;

c. H.R. 569 which would specify detailed tanker design and equipment standards, including segregated ballast tanks, double bottoms, additional horsepower, multiple screws, multiple rudders, and bow and stern thrusters.

A true copy of each of the bills is filed herewith as Exhibit AA.

135. Vessels of the United States are vessels documented under the laws of the United States. Documented vessels are those registered, enrolled and licensed, or licensed by the U.S. Coast Guard. 46 C.F.R. §§ 66.03-7, -9. "Enrolled and licensed vessels" are United States flag vessels in excess of 20 tons engaged exclusively in domestic trade and authorized to engage in a particular trade. "Registered vessels" are United States flag vessels entitled to engage in international trade, though such vessels may on occasion also engage in domestic trade. "Licensed vessels" are United States flag vessels authorized to engage in a particular domestic trade.

136. United States vessels must, with some exceptions, be constructed in American shipyards, owned by United States citizens or corporations, and served by an American crew. Only American built United States flag vessels may engage in the coastwise (interstate) trade.

137. Enrolled vessels must obtain a federal license in the form prescribed by 46 U.S.C. § 263.

138. Under 46 U.S.C. § 264 a registered U.S. flag vessel may be enrolled and licensed upon surrender of its registry.

139. 46 U.S.C. § 251, a true copy of which is filed herewith as Exhibit BB, grants to enrolled and licensed or licensed vessels the right to engage in domestic trade.

140. 46 U.S.C. § 221, a true copy of which is filed herewith as Exhibit CC, grants to registered vessels "the benefits and privileges appertaining to \* \* \* vessels [of the United States]."

141. 46 U.S.C. § 364, a true copy of which is filed herewith as Exhibit DD, provides that enrolled vessels shall be under the control and direction of pilots licensed by the Coast Guard when operating within U.S. Territorial waters.

142. 46 U.S.C. § 215, a true copy of which is filed herewith as Exhibit EE, provides that a state may require state licensed pilots on registered vessels, but may not require such pilots on enrolled vessels.

143. Other federal statutes and regulations relating to vessel design, construction and required equipment; vessel safety; and control of tanker-related oil pollution include the following:

a. The Oil Pollution Act of 1961, as amended, 33 U.S.C. §§ 1001 *et seq.*, implements the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954, as amended in 1962, by establishing, *inter alia*, certain restrictions on the discharge of oil. Regulations pursuant to the Oil Pollution Act are found in 33 C.F.R. Part 151.

b. The Oil Pollution Act Amendments of 1973, Pub. L. No. 93-119, 87 Stat. 424, amended the Oil Pollution Act of 1961, to add 33 U.S.C. § 1004a. Section 1004a requires that all tankers built after specified dates must comply with the standards of the 1971 Amendments to the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954, with respect to cargo tank arrangement and size. These standards are set out in Coast Guard interpretative

rules, 33 C.F.R. § 151.50. Section 1004a is effective, as to U.S. flag tankers, upon ratification of the Amendments to the Convention by the United States, 33 U.S.C. § 1016(a), or, as to foreign flag tankers, upon entry into force of the Amendments, 33 U.S.C. § 1016(c), neither of which has yet occurred. The Coast Guard has incorporated these standards into its regulations for tankers in interstate trade referred to in paragraph 128 *supra*.

c. The Vessel Bridge-to-Bridge Radiotelephone Act, Pub. L. No. 92-63, 85 Stat. 164, 33 U.S.C. §§ 1201 *et seq.*, and regulations adopted pursuant thereto, 33 C.F.R. Part 26, require every vessel over 300 gross tons to have radiotelephone equipment on its bridge.

d. The International Voyage Load Line Act of 1973, Pub. L. No. 93-115, 87 Stat. 418, 46 U.S.C. §§ 86 *et seq.*, implements the provisions of the International Convention on Load Lines, 1966, by authorizing the Coast Guard to prescribe and enforce load limits for vessels engaged in international voyages. The Coastwise Load Line Act, as amended, 46 U.S.C. §§ 88 *et seq.*, gives the Coast Guard similar authority with respect to vessels engaged in coastwise voyages. Coast Guard regulations implementing these Acts are set forth in Subchapter E of Title 46 of the Code of Federal Regulations.

e. The Merchant Marine Act of 1970, Pub. L. No. 91-469, 84 Stat. 1018, amended the Merchant Marine Act of 1936, 46 U.S.C. §§ 1101 *et seq.*, to extend application of the federal ship construction and operating subsidy programs to bulk cargo carriers, including tankers. Pursuant to this Act, the Maritime Administration has promulgated regulations and orders setting out design and construction standards for oil tankers as part of its Standard Specifications for Merchant Ship Construction.

f. The International Regulations for Preventing Collisions at Sea, Pub. L. No. 88-131, 77 Stat. 194, 33 U.S.C. §§ 1051 *et seq.*, implement the international convention establishing certain standards for lights, sound signals, steering rules and maneuvering requirements for vessels on the high seas. Similar navigation rules for rivers, harbors and other inland waters of the United States are prescribed by 33 U.S.C. §§ 151 *et seq.* and by Coast Guard regulations set forth in Title 33 of the Code of Federal Regulations.

g. Section 311 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 *et seq.*, authorizes, *inter alia*, federal regulations which specify procedures, methods, equipment and other requirements to prevent and contain the discharge of oil from vessels, onshore facilities and offshore facilities, and which govern the inspection of tankers in order to reduce the likelihood of discharges in violation of the Section. § 311(j), 33 U.S.C. § 1321(j). Regulations under § 311(j) appear in 33 C.F.R. Parts 154-156. Section 311(o), 33 U.S.C. § 1321(o), provides that § 311 does not preempt any state from imposing any requirement or liability with respect to the discharge of oil into its waters and that § 311 does not affect any state law not in conflict with the Section.

h. The intervention on the High Seas Act, Pub. L. No. 93-248, 88 Stat. 8, 33 U.S.C. §§ 1471 *et seq.*, implements the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, by authorizing the Coast Guard to take necessary action to protect the United States against oil pollution or the threat of oil pollution resulting from a casualty on the high seas outside its territorial waters.

144. Section 8 of the Merchant Marine Act of 1920, 46 U.S.C. § 867, provides that the Maritime Administration is responsible for the promotion of efficiency and lower costs in transportation of commodities in U.S. foreign commerce, including the importation of oil.

145. The Rivers and Harbors Act, 33 U.S.C. § 407, provides that the creation of any unauthorized obstruction to the navigable capacity of U.S. waters is prohibited. A true copy of the section is filed herewith as Exhibit FF.

146. The Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280, establishes a program of federal grants to coastal states to develop coastal zone management programs. Pursuant to this program the State of Washington has submitted a coastal zone management program which is awaiting action by the Secretary of Commerce.

147. The Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126, 33 U.S.C. §§ 1501 *et seq.*, authorizes the Coast Guard to issue licenses for the construction and operation of deepwater offshore oil terminals beyond the territorial limits of the United States.

148. Several bills intended to regulate liability for oil pollution damage have been introduced in the current session of Congress, including S. 1754, H.R. 9294, and H.R. 10756, which would establish a comprehensive oil pollution liability and compensation scheme. True copies of these bills are filed herewith as Exhibit GG.

#### INTERNATIONAL AGREEMENTS

149. The convention on the Inter-Governmental Maritime Consultative Organization, adopted by the United Nations Maritime Conference held in Geneva in 1948, came into force in March, 1958. 9 U.S.T. 621, T.I.A.S. 4044, 289 U.N.T.S. 48. It created the Inter-Governmental Maritime Consultative Organization ("IMCO"), an agency of the United Nations with responsibilities in the maritime field. Membership in IMCO is open to all members of the United Nations. As of the end of 1975, there were 92 full Members of IMCO. The United States is a Member of IMCO, as are all other major maritime nations. IMCO has served as a forum for the development of international standards in the fields of vessel safety and pollution prevention, including the negotiation and adoption of many of the international agreements referred to in paragraph 150.

150. The following are international conventions relating to vessel safety and pollution prevention:

a. International Convention for the Safety of Life at Sea, 1960, 16 U.S.T. 185, T.I.A.S. 5780, 536 U.N.T.S. 27 ("SOLAS"). SOLAS contains numerous provisions designed

to insure the safety of human life on all types of vessels engaged in international voyages, including oil tankers. These provisions include vessel design and equipment requirements. SOLAS also provides for periodic inspection and certification of ships by their nation of registry. SOLAS was ratified by the United States in 1962 and entered into force in 1965. A true copy is filed herewith as Exhibit HH.

b. International Convention on Load Lines, 1966, 18 U.S.T. 1857, T.I.A.S. 6331, 640 U.N.T.S. 133. This Convention establishes load limits for vessels engaged in international voyages by prescribing the maximum draft to which the ship is permitted to be loaded. The Convention was ratified by the United States in 1966, and entered into force in 1968. A true copy is filed herewith as Exhibit II.

c. International Regulations for Preventing Collisions at Sea, 1960, 16 U.S.T. 794, T.I.A.S. 5813, revised in 1972. These regulations establish certain standards for lights, sound signals, steering rules, and maneuvering requirements for vessels on the high seas. The regulations have been in force since 1965. A true copy is filed herewith as Exhibit JJ.

d. International Convention for the Prevention of Pollution of the Sea by Oil, 1954, 12 U.S.T. 2989, T.I.A.S. 4900, 327 U.N.T.S. 3, as amended, 17 U.S.T. 1523, T.I.A.S. 6109, 600 U.N.T.S. 332. This Convention was ratified by the United States in 1961 and has been in force for the United States since that year. The 1962 Amendments were ratified by the United States and entered into force in 1967. The principal provision of the Convention, as amended, proscribes discharge of oil from vessels into the sea within fifty miles of land. Further amendments to the Convention were adopted by IMCO Conferences in 1969 and 1971, and to date only the 1969 amendments have been ratified by the United States and neither set of amendments has entered into force. The 1969 amendments establish more stringent oil discharge criteria. The 1971 amendments establish standards for cargo tank arrangement and size. A true copy of the Convention as amended in 1962 is filed herewith as Exhibit KK. True copies of the 1969 and 1971 amendments are filed herewith as Exhibits LL and MM respectively.

e. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, \_\_ U.S.T. \_\_, T.I.A.S. 8068, \_\_ U.N.T.S. \_\_\_. This Convention establishes the right of a coastal nation to take

necessary action to protect itself against oil pollution or the threat of oil pollution resulting from a casualty on the high seas outside its territorial waters. The Convention was ratified by the United States in 1971 and entered into force in 1975. A true copy is filed herewith as Exhibit NN.

f. International Convention on Civil Liability for Oil Pollution Damage, 1969, \_\_\_\_ U.N.T.S. \_\_\_\_ This Convention imposes upon owners of ships transporting oil strict, but limited, liability for oil pollution damage. The Convention entered into force in 1975, but to date it has not been ratified by the United States. A true copy is filed herewith as Exhibit OO.

g. Three other conventions dealing with protection from oil pollution or compensation in the event of oil pollution have been adopted by conferences convened by IMCO, but have to date neither been ratified by the United States nor entered into force:

(i). International Convention for the Prevention of Pollution from Ships, 1973, opened for signature at London, November 2, 1973. The Convention incorporates the provisions of and, if it comes into force, will supersede, as between parties, the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, including the 1971 Amendments thereto relating to cargo tank arrangement and size. The Convention also contains certain additional tanker design and construction requirements for the purpose of preventing oil pollution. The Convention further provides for periodic inspection and certification of tankers by their nation of registry. A true copy is filed herewith as Exhibit PP.

(ii). The Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution By Substances Other Than Oil, 1973, opened for signature at London, November 2, 1973. This Protocol would extend the provisions of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties to hazardous substances other than crude or heavy oils (e.g., light refined oil products). A true copy is filed herewith as Exhibit QQ.

(iii). International Convention on the Establishment of an International Fund for Compensation for Oil

Pollution Damage, 1971, opened for signature at Brussels, December 18, 1971. This Convention would establish a fund to insure adequate compensation for pollution damage above the limitation specified in the 1969 Civil Liability Convention. A true copy is filed herewith as Exhibit RR.

151. No treaty, convention, or agreement described in paragraph 150 *supra* contains any provision which by its terms prohibits or would prohibit the United States from prescribing additional, more stringent standards for any vessel entering its ports or territorial waters.

152. Various treaties and international agreements define the international boundary line between the United States and Canada. These international agreements establish a boundary line running westward along the forty-ninth parallel to the middle of the channel which separates Vancouver Island from the mainland, and then southerly through the middle of Haro Strait and then westerly through the middle of the Strait of Juan de Fuca to the Pacific Ocean. Treaty Relating to Boundary Waters between the United States and Canada, 36 Stat. 2448, signed at Washington, January 11, 1909; proclaimed May 13, 1910. Treaty concerning the Canadian International Boundary, 35 Stat. 2003, signed at Washington April 11, 1908; proclaimed June 4, 1908. Treaty with Great Britain [in regard to the Canadian boundary] Westward of the Rocky Mountains, 9 Stat. 869, signed at Washington June 15, 1846, entered into force July 17, 1846. Protocol of a Conference Respecting the Northwest Water Boundary, 18 Stat. (pt. 2, Public Treaties) 369, signed at Washington March 10, 1873; entered into force March 10, 1873.

#### **STATE AND LOCAL STATUTES AND REGULATIONS**

153. Other states and political subdivisions have under consideration or have passed laws or promulgated regulations which purported to control various aspects of the design, navigation and operation of oil tankers. Such laws and regulations include the following:

a. The Alaska Ports, Harbors and Navigable Waterways Act, Senate Bill No. 405, now pending in the Alaska Legislature. Section 30.20.240 of this Act would require any oil tanker, whether enrolled or registered, of 40,000 DWT or more to employ a state-licensed pilot in Alaska waters. It would also require any oil tanker over 40,000 DWT to have while navigating in Alaska waters the assistance of tugboats with aggregate horsepower of five percent of the tanker's DWT unless it had all of the following safety features: horsepower in the ratio of one horsepower to each 2.5 DWT; lateral bow thrusters; double bottoms; segregated ballast; midship warning lights; double boilers or an auxiliary power source; docking-collision avoidance systems; two radars; and such other navigational systems as may be prescribed by the Alaska State Port Commission. The Act would not require twin screws. A true copy of the bill is filed herewith as Exhibit SS.

**EXHIBIT A**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE JUDGE COURT

## CHAPTER 125

[Substitute House Bill No. 527]  
**OIL TANKER TRANSPORTATION ON PUGET  
SOUND AND ADJACENT WATERS**

**AN ACT** Relating to water pollution from petroleum spills; and adding new sections to chapter 88.16 RCW.

Be it enacted by the Legislature of the State of Washington:

**NEW SECTION.** Section 1. There is added to chapter 88.16 RCW a new section to read as follows:

Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.

The legislature also recognizes Puget Sound and adjacent waters are a relatively confined salt water environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.

The legislature further recognizes that certain areas of Puget Sound and adjacent waters have limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.

For these reasons, it is important that large oil tankers be piloted by highly skilled persons who are familiar with local waters and that such tankers have sufficient capability for rapid maneuvering responses.

It is therefore the intent and purpose of sections 2 and 3 of this 1975 act to decrease the likelihood of oil spills on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ Washington state licensed pilots and, if lacking certain safety and maneuvering capability requirements, to be escorted by a tug or tugs while navigating on certain areas of Puget Sound and adjacent waters.

**NEW SECTION.** Sec. 2. There is added to chapter 88.16 RCW a new section to read as follows:

Notwithstanding the provisions of RCW 88.16.070, any oil tanker, whether enrolled or registered, of fifty thousand deadweight tons or greater, shall be required to take a Washington state licensed pilot while navigating Puget Sound and adjacent waters and shall be liable for and pay pilotage rates pursuant to RCW 88.16.030 as now or hereafter amended.

**NEW SECTION.** Sec. 3. There is added to chapter 88.16 RCW a new section to read as follows:

(1) Any oil tanker, whether enrolled or registered, of greater than one hundred and twenty-five thousand deadweight tons shall be prohibited from proceeding beyond a point east of a line extending from Discovery Island light south to New Dungeness light.

(2) An oil tanker, whether enrolled or registered, of forty to one hundred and twenty-five thousand deadweight tons may proceed beyond the points enumerated in subsection (1) if such tanker possesses all of the following standard safety features:

- (a) Shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons; and
- (b) Twin screws; and
- (c) Double bottoms, underneath all oil and liquid cargo compartments; and

(d) Two radars in working order and operating, one of which must be collision avoidance radar; and

(e) Such other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners:

**PROVIDED,** That, if such forty to one hundred and twenty-five thousand deadweight ton tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker, subsection (2) of this section shall not apply: **PROVIDED FURTHER,** That additional tug shaft horsepower equivalencies may be required under certain conditions as established by rule and regulation of the Washington utilities and transportation commission pursuant to chapter 34.04 RCW: **PROVIDED FURTHER,** That a tanker of less than forty thousand deadweight tons is not subject to the provisions of this act.

\***NEW SECTION.** Sec. 4. There is added to chapter 88.16 RCW a new section to read as follows:

*The Washington utilities and transportation commission is authorized to make rules and regulations necessary to implement the provisions of this act.*

**\*Sec. 4. was vetoed, see message at end of chapter.**

**NEW SECTION.** Sec. 5. The House and Senate Transportation and Utilities Committees are authorized and directed to study the feasibility, benefits, and disadvantages of requiring similar pilot and tug assistance for vessels carrying other potentially hazardous materials and to submit their findings and recommendations prior to the 45th session of the Washington legislature in January, 1977. Such study shall also include a report on the feasibility, benefits and disadvantages of requiring vessels under tug escort to observe a speed limit, and such study shall include a discussion of the impact of a speed limit on the maneuverability of the vessel, the effectiveness of the tug escort and other legal and technical considerations material and relevant

to the required study. Such study shall also include an evaluation and recommendations as to whether there should be a transfer of all duties and responsibilities of the board of pilotage commissioners to the Washington utilities and transportation commission or other state agency, and alternate methods for establishing fair and equitable rates for tug escort and pilot transfer.

**NEW SECTION.** Sec. 6. If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

\***NEW SECTION.** Sec. 7. *The provisions of this 1975 act shall expire on June 30, 1978.*

\*Sec. 7. was vetoed, see message at end of chapter.

Passed the House May 21, 1975.

Passed the Senate May 9, 1975.

Approved by the Governor May 29, 1975, with the exception of sections 4 and 7 which are vetoed.

Filed in Office of Secretary of State May 29, 1975.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith without my approval as to two sections Substitute House Bill No. 527 entitled:

"AN ACT Relating to water pollution from petroleum spills."

This bill provides, among other things, safety standards for oil tankers and other precautionary measures for prevention of major oil spills in Puget Sound and adjacent waters.

Section 4 of the bill authorizes the Utilities and Transportation Commission to implement the provisions of the act by rules and regulations. I am puzzled over this

delegation of major responsibility to the commission, which has had no previous experience or expertise in the area. Nor is there funding provided which might allow the commission to do a creditable job in this new field of responsibility. Elsewhere in the bill a study is authorized on the desirability of transferring the duties and responsibilities of the Board of Pilotage Commissioners to the Utilities and Transportation Commission or any other appropriate state agency. Until there are findings determined in such study which confirm the need to assign the responsibility of implementing and enforcing the provisions of this act to the commission, I am not willing to allow a situation to exist where separate agencies in state government have substantially overlapping duties in this area of increasing importance without clear direction from the Legislature.

Section 7 provides an expiration date for the act of June 30, 1978. Few would disagree that this state must soon decide and act on long range solutions to the problems created by the transportation of oil in massive quantities in Puget Sound waters. By passing this bill, the Legislature has decided that at least in the near future, oil tankers exceeding 125,000 deadweight tons should not be permitted to enter these waters. The study provided in section 5 may well offer some additional alternatives. The expiration date, however, rather than encouraging all parties to develop sound long range solutions, would instead discourage such efforts. This state could, conceivably, find itself in the second half of 1978 faced with unprecedented supertanker traffic in Puget Sound waters with all the attendant hazards but without any capability to prevent or reduce the risk of oil spills likely to produce catastrophic and permanent damage to the unique environment of the area. The expiration date would also leave the oil industry and others affected in an untenable state of uncertainty over permissible and impermissible activities in the transportation of oil into this area. Neither public nor private interests would be benefited by such uncertainty.

For the foregoing reasons, I have determined to veto sections 4 and 7 of the bill. With the exception of those sections, the remainder of the bill is approved."

**EXHIBIT B**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE JUDGE COURT  
(Letterhead omitted in printing.)

August 11, 1975

TO: All Pilots Licensed by the State of Washington  
All Steamship Operators or Agents Registered with  
the Board of Pilotage Commissioners  
All Other Interested Parties

FROM: State of Washington  
Department of Labor and Industries

SUBJECT: Order Implementing New Requirements for Oil  
Tankers on Puget Sound Waters in Accordance  
with SHB 527

On September 8, 1975, the Board of Pilotage Commissioners will begin enforcing several new requirements relating to oil tankers on Puget Sound waters. These requirements were added to the Washington State Pilotage Act by the recent passage of SHB 527 by the Legislature. A copy of SHB 527, as partially vetoed and signed by the Governor is enclosed.

The following paragraphs summarize the new requirements as they will be administered by the Board of Pilotage Commissioners:

NOTE: The term "deadweight tons" (DWT) is defined as the cargo carrying capacity of a vessel, to include necessary fuel oils, stores, and potable water, as expressed in long tons (2,240 pounds equals one long ton).

A. Any enrolled oil tanker of 50,000 DWT or greater and every registered oil tanker regardless of cargo carrying capacity shall have on board a Washington State licensed pilot while navigating Puget Sound and adjacent inland waters.

B. Any oil tanker, enrolled or registered, greater than 125,000 DWT shall be prohibited from proceeding beyond a point east

of a line extending from the Discovery Island light southward to the New Dungeness light.

C. Any oil tanker, enrolled or registered, of 40,000 to 125,000 DWT may proceed into Puget Sound waters provided it has all of the following safety features: (1) shaft horsepower in the ratio of one horsepower to each two and one-half DWT; and (2) twin screws; and (3) double bottoms underneath all oil and liquid cargo compartments; and (4) two radars in working order and operating, one of which must be collision avoidance radar; and (5) such other navigational position location systems as may be prescribed from time to time by the Board of Pilotage Commissioners.

D. Any oil tanker, enrolled or registered, of 40,000 to 125,000 DWT which does not have all the safety features prescribed in section C above, may proceed into Puget Sound waters only if it has a tug escort with an aggregate shaft horsepower equivalent to five percent of the DWT of the oil tanker. For example, an oil tanker of 125,000 DWT would require a tug escort having 6,250 aggregate shaft horsepower, whereas an oil tanker of 40,000 DWT would require a 2,000 horsepower tug escort. (NOTE: Oil tankers of less than 40,000 DWT are not required to have either the safety features listed above or any tug escorts.)

1. Tug escorts shall begin and end at a point east of a line extending from the Discovery Island light southward to the New Dungeness light.

2. Any oil tanker of 40,000 to 125,000 DWT which is fully in ballast may move in Puget Sound waters without the safety features prescribed in Section C above and without a tug escort.

3. Any enrolled oil tanker between 40,000 and 50,000 DWT is not required to have on board a State licensed pilot, but must have either the safety features prescribed in C above or the appropriate tug escort.

E. The steamship companies or their agents shall be responsible for ordering any required tugs and for contacting the

pilot dispatch station for required pilotage services as set forth in this order. Additionally, the State licensed pilot is required to advise the master of oil tankers of such requirements. In the event of any violation of these rules that comes to the attention of the Pilot, he is required to immediately notify the appropriate authorities.

Further, the clear intent of the legislation is expressed in Section 1 in which it states in part that "the intent and purpose of the Act is to decrease the likelihood of oil spills on Puget Sound and its shorelines \* \* \*". Accordingly, it is the Board's interpretation that all such requirements contained in SHB 527 apply to oil tankers engaged in the business of transporting petroleum products. The provisions of this Act do not apply if such vessels defined as oil tankers are engaged exclusively in transporting cargo other than petroleum products; however, it should be understood that this interpretation applies to the provisions of SHB 527 and does not remove existing requirements for any such vessels already included in the Washington State Pilotage Act.

(Signed): William C. Jacobs, Chairman  
Board of Pilotage Commissioners

**EXHIBIT C**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE JUDGE COURT**

List of all crude oil tankers received at Atlantic Richfield's Cherry Point refinery since it commenced operations through 1975.

<b>Date of Arrival</b>	<b>Name</b>	<b>DWT (000)</b>	<b>Flag</b>
5/15/72	San Juan Voyager	131	Liberia
7/10/72	Joseph D. Potts	81	U.S.*
8/9/72	Arco Sag River	70	U.S.
10/14/72	San Juan Voyager	131	Liberia
11/10/72	Harima Maru	115	Japan
11/22/72	Arco Prudhoe Bay	70	U.S.
12/12/72	Arco Prudhoe Bay	70	U.S.
12/29/72	San Juan Voyager	131	Liberia
1/19/73	Golden Gate	62	U.S.
1/31/73	Arco Sag River	70	U.S.
3/2/73	Kinna Dan	72	Denmark
3/13/73	San Juan Voyager	131	Liberia
3/18/73	Arco Prudhoe Bay	70	U.S.
4/2/73	Arco Colombia	58	Liberia
4/23/73	Harima Maru	115	Japan
6/3/73	Toxon	63	Liberia
6/13/73	Trident	70	Liberia
7/3/73	Almizar	109	Liberia
7/19/73	Arco Prudhoe Bay	70	U.S.
8/3/73	Arco Colombia	58	Liberia
8/10/73	San Juan Voyager	131	Liberia
8/28/73	Biscay Maru	100	Japan
9/8/73	Seven Stars	98	Sweden
9/18/73	Lily Prima	134	Italy
9/26/73	Eugenie	64	Liberia
10/1/73	Bjorgfjell	73	Norway
10/5/73	Slavisa Vajner	70	Yugoslavia
10/10/73	Arco Anchorage	120	U.S.

\*United States abbreviated as U.S. in printing

*Exhibit C*

<b>Date Arrival</b>	<b>Name</b>	<b>DWT (000)</b>	<b>Flag</b>
10/29/73	Sinclair Texas	50	U.S.
10/30/73	San Juan Venturer (now Marcona Venturer)	131	Liberia
11/14/72	Leon	65	Liberia
11/24/73	Almizar	109	Liberia
12/23/73	Almizar	109	Liberia
1/7/74	Kenai Peninsula	50	Liberia
1/20/74	Almizar	109	Liberia
2/2/74	Clementina	96	Liberia
2/16/74	San Juan Venturer (now Marcona Venturer)	131	Liberia
3/2/74	Arco Prudhoe Bay	70	U.S.
3/5/74	Spyros	64	Liberia
3/19/74	Seatiger	122	Liberia
4/5/74	Clementina	96	Liberia
4/15/74	Almizar	109	Liberia
4/29/74	Marcona Voyager (formerly San Juan Voyager)	131	Liberia
5/10/74	Arco Anchorage	120	U.S.
5/17/74	Naess Leader	45	Liberia
5/18/74	Seatiger	122	Liberia
5/20/74	Naess Leader	45	Liberia
5/23/74	Kongshav	102	Norway
6/14/74	Marcona Venturer (formerly San Juan Venturer)	131	Liberia
6/20/74	Tamano Maru	116	Japan
7/5/74	Clementina	96	Liberia
7/8/74	Arco Anchorage	120	U.S.
7/15/74	Sinclair Texas	50	U.S.
7/26/74	Jundia	116	Brazil
7/31/74	Sinclair Texas	50	U.S.
8/4/74	Seatiger	122	Liberia
8/10/74	Hakuyoh Maru	100	Japan
8/13/74	Sinclair Texas	50	U.S.
9/7/74	Arco Juneau	120	U.S.
9/16/74	Clementina	96	Liberia

*Exhibit C*

<b>Date of Arrival</b>	<b>Name</b>	<b>DWT (000)</b>	<b>Flag</b>
9/28/74	Arco Anchorage	120	U.S.
10/7/74	Seatiger	122	Liberia
10/21/74	Arco Fairbanks	120	U.S.
11/5/74	Arco Juneau	120	U.S.
12/2/74	Arco Anchorage	120	U.S.
12/5/74	Arco Anchorage	120	U.S.
12/22/74	Arco Fairbanks	120	U.S.
12/23/74	Sinclair Texas	50	U.S.
1/7/75	Burmah Pearl	138	Britain
1/20/75	Arco Juneau	120	U.S.
1/31/75	Toba Maru	126	Japan
2/19/75	Arco Anchorage	120	U.S.
2/27/75	Arco Fairbanks	120	U.S.
3/17/75	Seatiger	122	Liberia
3/31/75	Arco Juneau	120	U.S.
4/10/75	Clementina	96	Liberia
4/24/75	New Star	60	Liberia
5/2/75	Arco Anchorage	120	U.S.
5/16/75	Ania	128	Liberia
5/23/75	Grand West	49	Panama
5/27/75	Burmah Pearl	138	Britain
6/7/75	Arco Juneau	120	U.S.
6/17/75	Clementina	96	Liberia
6/28/75	Shirley	128	Liberia
7/12/75	Arco Fairbanks	120	U.S.
7/30/75	Sinclair Texas	50	U.S.
8/8/75	Arco Anchorage	120	U.S.
8/11/75	Wind Endeavour	125	Norway
8/19/75	Arco Juneau	120	U.S.
8/21/75	Allegro	100	Liberia
8/25/75	Sinclair Texas	50	U.S.
9/6/75	Seatiger	122	Liberia
9/18/75	Arco Fairbanks	120	U.S.
9/21/75	Kongshav	102	Norway
9/30/75	Penny Conway	98	Liberia
10/5/75	Universe Defender	58	Liberia
10/21/75	Arco Prudhoe Bay	70	U.S.
10/21/75	Sinclair Texas	50	U.S.

Date of Arrival	Name	DWT (000)	Flag
10/24/75	Arco Anchorage	120	U.S.
10/31/75	Arco Juneau	120	U.S.
11/11/75	W. Alton Jones	103	Liberia
11/22/75	Kikuwa Maru	112	Japan
11/27/75	Jequitiba	116	Brazil
12/9/75	Clementina	96	Liberia
12/20/75	Arco Fairbanks	120	U.S.

List of deliveries of crude oil to Cherry Point by tankers of 40,000 DWT or less since it commenced operations through 1975.

Date of Arrival	Name	DWT (000)	Flag
3/19/72	David E. Day	20	U.S.
7/14/72	Atlantic Trader	20	U.S.
7/26/72	Atlantic Trader	20	U.S.
8/5/72	Atlantic Trader	20	U.S.
9/20/72	Atlantic Trader	20	U.S.
11/5/72	Atlantic Trader	20	U.S.
12/1/72	Atlantic Trader	20	U.S.
12/11/72	Atlantic Trader	20	U.S.
5/18/73	David E. Day	20	U.S.
7/29/73	David E. Day	20	U.S.

**EXHIBIT D**  
**UNITED STATES DISTRICT COURT**  
**WESTERN DISTRICT OF WASHINGTON**  
**THREE JUDGE COURT**

List of crude oil tankers in excess of 125,000 DWT  
 received at Atlantic Richfield's Cherry Point refinery since it  
 commenced operations through September 8, 1975.

Date of Arrival	Name	DWT (000)	Flag
5/15/72	San Juan Voyager (fully loaded)	131	Liberia
10/14/72	San Juan Voyager	131	Liberia
12/29/72	San Juan Voyager	131	Liberia
3/13/73	San Juan Voyager (fully loaded)	131	Liberia
8/10/73	San Juan Voyager (fully loaded)	131	Liberia
9/18/73	Lily Prima (fully loaded)	134	Italy
10/30/73	San Juan Venturer (fully loaded)	131	Liberia
2/16/74	San Juan Venturer	131	Liberia
4/29/74	Marcona Voyager (fully loaded)	131	Liberia
6/14/74	Marcona Venturer (fully loaded)	131	Liberia
1/7/75	Burmah Pearl	138	Britain
1/31/75	Toba Maru (fully loaded)	126	Japan
5/16/75	Ania	128	Liberia
5/27/75	Burmah Pearl (fully loaded)	138	Britain
6/28/75	Shirley (fully loaded)	128	Liberia

**EXHIBIT F**  
**UNITED STATES DISTRICT COURT**  
**WESTERN DISTRICT OF WASHINGTON**  
**THREE JUDGE COURT**

List of all crude oil tankers received through the  
 Port of Long Beach for Atlantic Richfield's Carson refinery from  
 March 1972 through 1975.

Date of Arrival	Name	DWT (000)	Flag
3/2/72	San Juan Voyager (fully loaded)	131	Liberia
5/9/72	San Juan Voyager (fully loaded)	131	Liberia
7/23/72	San Juan Voyager	131	Liberia
9/29/72	San Juan Voyager (fully loaded)	131	Liberia
12/26/72	San Juan Voyager	131	Liberia
3/18/73	San Juan Voyager (fully loaded)	131	Liberia
8/16/73	San Juan Voyager	131	Liberia
9/22/73	Lily Prima	134	Italy
11/6/73	San Juan Voyager	131	Liberia
2/6/75	Toba Maru	126	Japan
6/3/75	Mesologi	128	Greece
7/21/75	Universe Patriot	158	Liberia
8/8/75	Japan Mimosa	166	Japan
8/29/75	Nai Marcus	150	Italy
9/30/75	Skaubo (fully loaded)	129	Norway
10/7/75	Skaubo	129	Norway
10/15/75	Fairfield (fully loaded)	140	Liberia
11/28/75	Kaiko Maru	137	Japan

**EXHIBIT N**

UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 THREE JUDGE COURT

Federal, State, County and Local Public  
 Parks and Recreation Sites Located  
 on or Adjacent to Puget Sound

**Federal (5)**

Dungeness Recreational Park (Bureau of Reclamation)  
 Rainbow (Forest Service)  
 San Juan Island National Historical Park  
 Seal Rock — Hood Canal (Forest Service)  
 Washington Park, Sunset Beach (Bureau of Reclamation)

**State (65)**

Bay View	Fay Bainbridge	Lime Kiln Point	Shine Tidelands
Belfair	Fort Casey	Lopez Is. Tidelands	Skull Island
Birch Bay	Fort Ebey	Manchester	South Whidbey
Blake Island	Fort Flagler	Matia Island	Spencer Spit
Blird Island	Fort Ward	McMicken Island	Squaxin Island
Camano Island	Fort Worden	Moran	Stretch Point
Clark Island	Freeman Island	Mukilteo	Sucia Island
Cone Island	Harper	Mystery Bay	Toandos Tidelands
Danger Island	Harvey Rensland	Old Fort Townsend	Tolmie
Dash Point	Iceberg Island	Olga	Twanoh
Deadman's Is.	Illahee	Pateos Island	Unnamed Island
Deception Pass	James Island	Penrose Point	Useless Bay
Doe Island	Jarrell Cove	Potlatch	Victim Island
Dosewallips	Kitsap Memorial	Rock Island	Wolfe Site
Dungeness	Kopachuck	Saddlebag Island	Jones Island
Eagle Island	Larrabee	Scenic Beach	Turn Island
Everett Jetty	Lilliwaup Tidelands	Sequim Bay	Posey Island

**State Department of Natural Resources (7)**

Robert F. Kennedy	Obstruction Pass
Taylor Beach	Point Doughty
Smith Island	Lummi Island
Loon Island	

**County (65)**

Clallam:	Dungeness Recreation Area
	Port Williams
Island:	Admiralty Bay
	Baby Island Heights No. 1
	Baby Island Heights No. 2
	Bayview
	Beachcombers
	Bonnie View Acres
	Bush Point
	Cavalero Beach
	Cornet Bay
	Dave Mackie Memorial
	Davis Landing
	Freeland
	Glendale
	Greenbank
	Lagoon Point No. 1
	Lagoon Point No. 2
	Lawana Beach
	Ledgewood Beach
Jefferson:	Shine Park
King:	Dockton
	Point Robinson
	Richmond Beach
	Seahurst
Kitsap:	Arness Roadside Park
	Harper Park
	Keyport
	Salisbury
	Point No Point
	Silverdale Waterfront

Mason:	Indian Beach
	Mading Orchard Beach
	Shorecrest
	Walker Park
Pierce:	Browns Point
	Dash Point
San Juan:	American Camp
	Odlin
	San Juan
Snohomish:	Kayak Point
	Meadowdale
	Picnic Point
Thurston:	Burfoot Cove
	Fry Cove
Whatcom:	Lighthouse Marine Park
	Lummi Marina Park

**City (16)**

Alki Point (Seattle)	Langley City Marina
Coupeville Boat Landing	Langley Park
Coupeville Boat Launch	Oak Harbor City Park
Coupeville City Marina	Point Defiance (Tacoma)
Coupeville City Park	Port Bellingham Park
Dan Porter Memorial (Clinton)	Priest Point
Golden Gardens (Seattle)	Sunrise Beach (Langley)
Karkey Park (Seattle)	Sunset Terrace

**Visitations to State Parks in Northern Puget Sound**

Birch Bay	556,434
Deception Pass	1,221,631
Fort Casey	455,085
Fort Flagler	422,420
Fort Worden	597,878
Larrabee	360,702

Old Fort Townsend	115,152
Sequim Bay	767,274
Clark Island	6,745
Blind, Skull & Victim Islands	3,108
Doe Island	4,554
Stuart Island	101,238
Sucia Island	102,931
Jones Island	69,845
Matia Island	12,783
James Island	15,705
Spencer Spit	39,517
Turn Island	9,891
Patos Island	3,611
Posey Island	1,845
Saddlebag Island	<u>10,524</u>
Total	4,878,868

**EXHIBIT O**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE JUDGE COURT

**Tanker Casualties on Puget Sound**

The following table lists tanker casualties occurring in Puget Sound from 1941-1973. The data is based on the best information available from the United States Coast Guard and the Canadian Ministry of Transport. Tanker casualties are included on the list if they involved tankers greater than 7,000 DWT, or more than 5,000 feet in length, or with a draft of 18 feet or more.

*Exhibit O*

Tanker Name	DWT	Date	Location	Casualty Type	Principal Cause (If Known)	Amount of Oil Spilled
Coney	8,800*	9/12/43	Point Wilson	Collision	—	Unknown, if any
F.S. Bryant	12,600	9/2/69	South Sound	—	Adverse Weather	Unknown, if any
Lompoc	16,600	12/23/69	South Sound	—	Equipment Failure	Unknown, if any
Meadowbrook	27,200	4/7/70	South Sound	Grounding	Pilot Error	Unknown, if any
Meadowbrook	27,200	5/7/70	Bellingham Bay	—	—	Unknown, if any
Texaco California	20,000	7/27/71	North Sound	Improper Mooring	Improper Tug Assistance	Unknown, if any
Gaines Mill	20,700	1/11/72	North Sound	—	Improper Tug Assistance	Unknown, if any
David E. Day	20,000	2/4/72	North Sound	—	Equipment Failure	Unknown, if any
David E. Day	20,000	7/4/72	North Sound	—	Equipment Failure	Unknown, if any
MobilOil	31,800	6/9/72	South Sound	—	—	Unknown, if any
Nevada Standard	17,300	7/23/72	Niroutasos Inlet	Grounding	Navigational Error	Unknown, if any
Paul M. Gregg	12,800	—	West Point	Collision	—	Unknown, if any
Bunker Hill	16,600	3/6/64	South Rosario	Explosion	—	None

\*Estimate based on gross registered tons.

*Exhibit Q***EXHIBIT Q**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE JUDGE COURT

P.L. 92-340 LAWS OF 92nd Cong.—2nd SESS. July 10

PORTS AND WATERWAYS SAFETY ACT OF 1972

PUBLIC LAW 92-340; 86 STAT. 424

[H. R. 8140]

AN ACT to promote the safety of ports, harbors, waterfront areas, and navigable waters of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Ports and Waterways Safety Act of 1972".

**TITLE I—PORTS AND WATERWAYS SAFETY AND ENVIRONMENTAL QUALITY**

Sec. 101. In order to prevent damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters; and to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction, or loss, the Secretary of the department in which the Coast Guard is operating may—

(1) establish, operate, and maintain vessel traffic services and systems for ports, harbors, and other waters subject to congested vessel traffic;

(2) require vessels which operate in an area of a vessel traffic service or system to utilize or comply with that service or system, including the carrying or installation of electronic or other devices necessary for the use of the service or system;

(3) control vessel traffic in areas which he determines to

be especially hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by—

- (i) specifying times of entry, movement, or departure to, from, within, or through ports, harbors, or other waters;
- (ii) establishing vessel traffic routing schemes;
- (iii) establishing vessel size and speed limitations and vessel operating conditions; and
- (iv) restricting vessel operation, in a hazardous area or under hazardous conditions, to vessels which have particular operating characteristics and capabilities which he considers necessary for safe operation under the circumstances;
- (4) direct the anchoring, mooring, or movement of a vessel when necessary to prevent damage to or by that vessel or her cargo, stores, supplies, or fuel;
- (5) require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved;
- (6) establish procedures, measures, and standards for the handling, loading, discharge, storage, stowage, and movement, including the emergency removal, control and disposition, of explosives or other dangerous articles or substances (including the substances described in section 4417a(2) (A), (B), and (C) of the Revised Statutes of the United States (46 U.S.C. 391a(2) (A), (B), and (C)) on structures subject to this title;
- (7) prescribe minimum safety equipment requirements for structures subject to this title to assure adequate protection from fire, explosion, natural disasters, and other serious accidents or casualties;
- (8) establish water or waterfront safety zones or other measures for limited, controlled, or conditional access and activity when necessary for the protection of any vessel, structure, waters, or shore area; and
- (9) establish procedures for examination to assure compliance with the minimum safety equipment requirements for structures.

Sec. 102. (a) For the purpose of this Act, the term "United States" includes the fifty States, the District of Columbia, Puerto Rico, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

(b) Nothing contained in this title supplants or modifies any treaty or Federal statute or authority granted thereunder, nor does it prevent a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title.

(c) In the exercise of his authority under this title, the Secretary shall consult with other Federal agencies, as appropriate, in order to give due consideration to their statutory and other responsibilities, and to assure consistency of regulations applicable to vessels, structures, and areas covered by this title. The Secretary may also consider, utilize, and incorporate regulations or similar directory materials issued by port or other State and local authorities.

(d) This title shall not be applicable to the Panama Canal. The authority granted to the Secretary under section 101 of this title shall not be delegated with respect to the Saint Lawrence Seaway to any agency other than the Saint Lawrence Seaway Development Corporation. Any other authority granted the Secretary under this title shall be delegated to the Saint Lawrence Seaway Development Corporation to the extent that the Secretary determines such delegation is necessary for the proper operation of the Seaway.

(e) In carrying out his duties and responsibilities under this title to promote the safe and efficient conduct of maritime commerce the Secretary shall consider fully the wide variety of interests which may be affected by the exercise of his authority hereunder. In determining the need for, and the substance of, any rule or regulation or the exercise of other authority hereunder the Secretary shall, among other things, consider—

- (1) the scope and degree of the hazards;
- (2) vessel traffic characteristics including minimum interference with the flow of commercial traffic, traffic volume, the sizes and types of vessels, the usual nature of local cargoes, and similar factors;
- (3) port and waterway configurations and the differences in geographic, climatic, and other conditions and circumstances;

- (4) environmental factors;
- (5) economic impact and effects;
- (6) existing vessel traffic control systems, services, and schemes; and
- (7) local practices and customs, including voluntary arrangements and agreements within the maritime community

Sec. 103. The Secretary may investigate any incident, accident, or act involving the loss or destruction of, or damage to, any structure subject to this title, or which affects or may affect the safety or environmental quality of the ports, harbors, or navigable waters of the United States. In any investigation under this title, the Secretary may issue a subpoena to require the attendance of any witness and the production of documents and other evidence. In case of refusal to obey a subpoena issued to any person, the Secretary may request the Attorney General to invoke the aid of the appropriate district court of the United States to compel compliance. Witnesses may be paid fees for travel and attendance at rates not exceeding those allowed in a district court of the United States.

Sec. 104. The Secretary may issue reasonable rules, regulations, and standards necessary to implement this title. In the exercise of his rulemaking authority the Secretary is subject to the provisions of chapters 5 and 7 of title 5, United States Code. In preparing proposed rules, regulations, and standards, the Secretary shall provide an adequate opportunity for consultation and comment to State and local governments, representatives of the marine industry, port and harbor authorities, environmental groups, and other interested parties.

Sec. 105. The Secretary shall, within one year after the effective date of this Act, report to the Congress his recommendations for legislation which may be necessary to achieve coordination and/or eliminate duplication between the functions authorized by this Act and the functions of any other agencies.

Sec. 106. Whoever violates a regulation issued under this title shall be liable to a civil penalty of not more than \$10,000. The

Secretary may assess and collect any civil penalty incurred under this title and, in his discretion, remit, mitigate, or compromise any penalty. Upon failure to collect or compromise a penalty, the Secretary may request the Attorney General to commence an action for collection in any district court of the United States. A vessel used or employed in a violation of a regulation under this title shall be liable in rem and may be proceeded against in any district court of the United States having jurisdiction.

Sec. 107. Whoever willfully violates a regulation issued under this title shall be fined not less than \$5,000 or more than \$50,000 or imprisoned for not more than five years, or both.

## TITLE II—VESSELS CARRYING CERTAIN CARGOES IN BULK

Sec. 201. Section 4417a of the Revised Statutes of the United States (46 U.S.C. 391a)<sup>5</sup> is hereby amended to read as follows:

"Sec. 4417a. (1) Statement of Policy.—The Congress hereby finds and declares—

"That the carriage by vessels of certain cargoes in bulk creates substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein and of the adjoining land, including but not limited to fish, shellfish, and wildlife, marine and coastal ecosystems and recreational and scenic values, which waters and resources are hereafter in this section referred to as the 'marine environment'.

"That existing standards for the design, construction, alteration, repair, maintenance and operation of such vessels must be improved for the adequate protection of the marine environment.

"That it is necessary that there be established for all such vessels documented under the laws of the United States or entering the navigable waters of the United States comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation to prevent or mitigate the hazards to life, property, and the marine environment.

"(2) Vessels Included.—All vessels, regardless of tonnage size,

or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, which are documented under the laws of the United States or enter the navigable waters of the United States, except public vessels other than those engaged in commercial service, that shall have on board liquid cargo in bulk which is—

- "(A) inflammable or combustible, or
- "(B) oil, of any kind or in any form, including but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, or
- "(C) designated as a hazardous polluting substance under section 12(a) of the Federal Water Pollution Control Act (33 U.S.C. 1162);

shall be considered steam vessels for the purposes of title 52 of the Revised Statutes of the United States and shall be subject to the provisions thereof: *Provided*, That this section shall not apply to vessels having on board the substances set forth in (A), (B), or (C) above only for use as fuel or stores or to vessels carrying such cargo only in drums, barrels, or other packages: *And provided further*, That nothing contained herein shall be deemed to amend or modify the provisions of section 4 of Public Law 90-397 with respect to certain vessels of not more than five hundred gross tons: *And provided further*, That this section shall not apply to vessels of not more than five hundred gross tons documented in the service of oil exploitation which are not tank vessels and which would be subject to this section only because of the transfer of fuel from the vessels' own fuel supply tanks to offshore drilling or production facilities.

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<sup>8</sup> 46 U.S.C.A. § 391a.

"(3) Rules and Regulations.—In order to secure effective provision (A) for vessel safety, and (B) for protection of the marine environment, the Secretary of the department in which the Coast Guard is operating (hereafter referred to in this section as the 'Secretary') shall establish for the vessels to which this section applies such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo,

fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; and with respect to the handling and stowage of such cargo, the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life saving, fire protection, and the prevention and mitigation of damage to the marine environment; and with respect to the operation of such vessels; and with respect to the requirements of the manning of such vessels and the duties and qualifications of the officers and crew thereof; and with respect to the inspection of all the foregoing. In establishing such rules and regulations the Secretary may, after hearing as provided in subsection (4), adopt rules of the American Bureau of Shipping or similar American classification society for classed vessels insofar as such rules pertain to the efficiency of hulls and the reliability of machinery of vessels to which this section applies. In establishing such rules and regulations, the Secretary shall give due consideration to the kinds and grades of such cargo permitted to be on board such vessel. In establishing such rules and regulations the Secretary shall, after consultation with the Secretary of Commerce and the Administrator of the Environmental Protection Agency, identify those established for protection of the marine environment and those established for vessel safety.

"(4) Adoption of Rules and Regulations.—Before any rules or regulations, or any alteration, amendment, or repeal thereof, are approved by the Secretary under the provisions of this section, except in an emergency, the Secretary shall (A) consult with other appropriate Federal departments and agencies, and particularly with the Administrator of the Environmental Protection Agency and the Secretary of Commerce, with regard to all rules and regulations for the protection of the marine environment, (B) publish proposed rules and regulations, and (C) permit interested persons an opportunity for hearing. In prescribing rules or regulations, the Secretary shall consider, among other things, (i) the need for such rules or regulations, (ii) the extent to which such rules or regulations will contribute to safety or protection

of the marine environment, and (iii) the practicability of compliance therewith, including cost and technical feasibility.

**"(5) Rules and Regulations for Safety; Inspection; Permits; Foreign Vessels.**—No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations for vessel safety established hereunder, have on board such cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes of the United States and until a permit has been endorsed on such certificate of inspection by the Secretary, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder, and showing the kinds and grades of such cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Secretary on such certificate of inspection until such vessel has been inspected by the Secretary and found to be in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder. For the purpose of such inspection, approved plans and certificates of class of the American Bureau of Shipping or other recognized classification society for classed vessels may be accepted as evidence of the structural efficiency of the hull and the reliability of the machinery of such classed vessels except as far as existing law places definite responsibility on the Coast Guard. A certificate issued under the provisions of this section shall be valid for a period of time not to exceed the duration of the certificate of inspection on which such permit is endorsed, and shall be subject to revocation by the Secretary whenever he shall find that the vessel concerned does not comply with the conditions upon which such permit was issued: *Provided*, That rules and regulations for vessel safety established hereunder and the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States: *And provided further*, That no permit shall be issued under the provisions of this section authorizing the presence on board any vessel of any of the materials expressly prohibited from being thereon by subsection (3) of section 4472 of this title.

**"(6) Rules and Regulations for Protection of the Marine Environment; Inspection; Certification.**—No vessel subject to the provisions of this section shall, after the effective date of rules and regulations for protection of the marine environment, have on board such cargo, until a certificate of compliance, or an endorsement on the certificate of inspection for domestic vessels, has been issued by the Secretary indicating that such vessel is in compliance with such rules and regulations. Such certificate of compliance or endorsement shall not be issued by the Secretary until such vessel has been inspected by the Secretary and found to be in compliance with the rules and regulations for protection of the marine environment established hereunder. A certificate of compliance or an endorsement issued under this subsection shall be valid for a period specified therein by the Secretary and shall be subject to revocation whenever the Secretary finds that the vessel concerned does not comply with the conditions upon which such certificate or endorsement was issued.

**"(7) Rules and Regulations for Protection of the Marine Environment Relating to Vessel Design and Construction, Alteration, and Repair; International Agreement.**—**(A)** The Secretary shall begin publication as soon as practicable of proposed rules and regulations setting forth minimum standards of design, construction, alteration, and repair of the vessels to which this section applies for the purpose of protecting the marine environment. Such rules and regulations shall, to the extent possible, include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities.

**"(B)** The Secretary shall cause proposed rules and regulations published by him pursuant to subsection (7) (A) to be transmitted to appropriate international forums for consideration as international standards.

**"(C)** Rules and regulations published pursuant to subsection

(7) (A) shall be effective not earlier than January 1, 1974, unless the Secretary shall earlier establish rules and regulations consonant with international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment. In the absence of the promulgation of such rules and regulations consonant with international treaty, convention, or agreement, the Secretary shall establish an effective date not later than January 1, 1976, for rules and regulations previously published pursuant to this subsection (7) which he then deems appropriate.

"(D) Any rule or regulation for protection of the marine environment promulgated pursuant to this subsection (7) shall be equally applicable to foreign vessels and United States-flag vessels operating in the foreign trade. If a treaty, convention, or agreement provides for reciprocity of recognition of certificates or other documents to be issued to vessels by countries party thereto, which evidence compliance with rules and regulations issued pursuant to such treaty, convention, or agreement, the Secretary, in his discretion, may accept such certificates or documents as evidence of compliance with such rules and regulations in lieu of the certificate of compliance otherwise required by subsection (6) of this section.

"(8) Shipping Documents.—Vessels subject to the provisions of this section shall have on board such shipping documents as may be prescribed by the Secretary indicating the kinds, grades, and approximate quantities of such cargo on board such vessel, the shippers and consignees thereof, and the location of the shipping and destination points.

"(9) Officers; Tankermen; Certification.—(A) In all cases where the certificate of inspection does not require at least two licensed officers, the Secretary shall enter in the permit issued to any vessel under the provisions of this section the number of the crew required to be certified as tankermen.

"(B) The Secretary shall issue to applicants certificates as tankermen, stating the kinds of cargo the holder of such certificate

be proceeded against in the United States district court for any district in which the vessel may be found.

"(12) Injunctive Proceedings.—The United States district courts shall have jurisdiction for cause shown to restrain violations of this section or the rules and regulations promulgated hereunder.

"(13) Denial of Entry.—The Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States to any vessel not in compliance with the provisions of this section or the regulations promulgated thereunder."

Sec. 202. Regulations previously issued under statutory provisions repealed, modified, or amended by this title shall continue in effect as though promulgated under the authority of section 4417a of the Revised Statutes of the United States (46 U.S.C. 391a), as amended by this title, until expressly abrogated, modified, or amended by the Secretary of the Department in which the Coast Guard is operating under the regulatory authority of such section 4417a as so amended. Any proceeding under such section 4417a for a violation which occurred before the effective date of this title may be initiated or continued to conclusion as though such section 4417a had not been amended hereby.

Sec. 203. The Secretary of the Department in which the Coast Guard is operating shall, for a period of ten years following the enactment of this title, make a report to the Congress at the beginning of each regular session, regarding his activities under this title. Such report shall include but not be limited to (A) a description of the rules and regulations prescribed by the Secretary (i) to improve vessel maneuvering and stopping ability and otherwise reduce the risks of collisions, groundings, and other accidents, (ii) to reduce cargo loss in the event of collisions, groundings, and other accidents, and (iii) to reduce damage to the marine environment from the normal operation of the vessels to which this title applies, (B) the progress made with respect to the adoption of international standards for the design, construction, alteration, and repair of vessels to which this title applies for

is, in the judgment of the Secretary, qualified to handle aboard vessels with safety, upon satisfactory proof and examination, in form and manner prescribed by the Secretary, that the applicant is in good physical condition, that such applicant is trained in and capable efficiently to perform the necessary operations aboard vessels having such cargo on board, and that the applicant fulfills the qualifications of tankerman as prescribed by the Secretary under the provisions of this section. Such certificates shall be subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is provided in the case of suspension or revocation of licenses of officers under the provisions of section 4450 of this title.

"(10) Effective Date of Rules and Regulations.—Except as otherwise provided herein, the rules and regulations to be established pursuant to this section shall become effective ninety days after their promulgation unless the Secretary shall for good cause fix a different time. If the Secretary shall fix an effective date later than ninety days after such promulgation, his determination to fix such a later date shall be accompanied by an explanation of such determination which he shall publish and transmit to the Congress.

"(11) Penalties.—(A) The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall violate the provisions of this section, or the rules and regulations established hereunder, shall be liable to a civil penalty of not more than \$10,000.

"(B) The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall knowingly and willfully violate the provisions of this section or the rules and regulations established hereunder, shall be subject to a fine of not less than \$5,000 or more than \$50,000, or imprisonment for not more than five years, or both.

"(C) Any vessel subject to the provisions of this section, which shall be in violation of this section or the rules and regulations established hereunder, shall be liable in rem and may

protection of the marine environment, and (C) to the extent that the Secretary finds standards with respect to the design, construction, alteration, and repair of vessels for the purposes set forth in (A) (i), (ii), or (iii) above not possible, an explanation of the reasons therefor.

Approved July 10, 1972.

**EXHIBIT R**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE JUDGE COURT

SUBCHAPTER P—PORTS AND WATERWAYS SAFETY

PART 160—PORTS AND WATERWAYS SAFETY —  
GENERAL

Subpart A—General

Sec.

- 160.1 Purpose
- 160.11 Definitions.
- 160.15 Penalties.

Subpart B—Orders and Directions of the Captain of the Port  
and District Commander

- 160.31 Applicability.
- 160.35 Delegations.
- 160.39 Compliance with directions and orders.
- 160.45 Appeals.

AUTHORITY: See. 104.86 Stat. 427 (33 U.S.C. 1224); 49 CFR  
1.46(o)(4).

SOURCE: CGD 73-202, 40 FR 6654, Feb. 13, 1975, unless  
otherwise noted.

Subpart A—General

§ 160.1 Purpose.

This Subchapter P contains regulations implementing Title I of the Ports and Waterways Safety Act of 1972.

§ 160.11 Definitions.

For the purpose of this part:

(a) "United States" includes the fifty States, the District of Columbia, Puerto Rico, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

(b) "Vessel" means every description of watercraft or other

artificial contrivance used, or capable of being used, as a means of transportation on water.

(c) "Commandant" means the Commandant of the U.S. Coast Guard.

(d) "District Commander" means the Coast Guard officer designated by the Commandant to command a Coast Guard District described in Part 3 of this chapter.

(e) "Captain of the Port" means the Coast Guard officer, under the command of a District Commander, designated by the Commandant for the purpose of giving immediate direction to Coast Guard law enforcement activities within his assigned area as described in Part 3 of this chapter.

(f) "Person" includes an individual, firm, corporation, association, governmental entity, and a partnership.

#### **§ 160.15 Penalties.**

33 U.S.C. 1226 prescribes that whoever violates a regulation issued under Title I of the Ports and Waterways Safety Act of 1972 is liable to a civil penalty of not more than \$10,000. A vessel used or employed in a violation of these regulations is liable in rem. 33 U.S.C. 1227 prescribes that whoever willfully violates a regulation issued under Title I of the Ports and Waterways Safety Act of 1972 shall be fined not less than \$5,000 or more than \$50,000 or imprisoned for not more than five years, or both.

#### **Subpart B—Orders and Directions of the Captain of the Port and District Commander**

##### **§160.31 Applicability.**

This subpart applies to all vessels on the navigable waters of the United States, except the Saint Lawrence Seaway and the Panama Canal.

##### **§ 160.35 Delegations.**

To prevent damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters and to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction, or loss—

(a) Each District Commander, Captain of the Port, or their authorized representative may direct the anchoring, mooring, or movement of a vessel when necessary to prevent damage to or by that vessel or her cargo, stores, supplies, or fuel; and

(b) Each District Commander, Captain of the Port, or their authorized representative may temporarily control vessel traffic in an area which he determines to be especially hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by issuing orders.

(1) Specifying times of vessel entry, movement, or departure to, from, within, or through ports, harbors, or other waters;

(2) Establishing vessel traffic routing schemes;

(3) Establishing vessel size and speed limitations and vessel operating conditions; and

(4) Restricting vessel operation, in a hazardous area or under hazardous conditions, to vessels which have particular operating characteristics and capabilities which he considers necessary for safe operation under the circumstances.

##### **§ 160.39 Compliance with directions and orders.**

Each person who has notice of the terms of an order or direction issued under § 160.35 shall comply with that order or direction.

##### **§ 160.45 Appeals.**

(a) Any person directly affected by an order or direction issued under this part may request reconsideration by the official who issued the order or direction and may appeal the order or direction through the Captain of the Port to the District Commander and then to the Commandant, whose decision shall be final.

(b) Requests for reconsideration and appeals may be written or oral, but if oral must be followed by no less than a written outline of the key points made. The Coast Guard official to whom the request or appeal is made will provide a written decision if requested.

(c) While any request or appeal is pending the order or direction remains in effect.

**EXHIBIT T**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE JUDGE COURT**

**Title 33—Navigation and Navigable Waters**

**PART 161—VESSEL TRAFFIC SYSTEMS**

**Subpart A—[Reserved]**

**Subpart B—Puget Sound Vessel Traffic System**

**GENERAL RULES**

**Sec.**

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- 161.103 Definitions.
- 161.104 Vessel operation in the VTS Area.
- 161.105 Laws and regulations not affected.
- 161.107 VTC directions.
- 161.109 Authorization to deviate from these rules.
- 161.111 Emergencies.

**COMMUNICATION RULES**

- 161.120 Radio listening watch.
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- 161.126 Time.
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- 161.133 Radio failure.
- 161.134 Report of emergency or radio failure.
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- 161.136 Ferry vessels.

**VESSEL MOVEMENT REPORTING RULES**

- 161.142 Movement reports.

**TRAFFIC SEPARATION SCHEME RULES**

- 161.150 Vessel operation in the TSS.
- 161.152 Direction of traffic.

- 161.154 Anchoring in the TSS.  
 161.156 Joining, leaving, and crossing a traffic lane.

#### ROSARIO STRAIT RULES

- 161.170 Communications in Rosario Strait.  
 161.172 Report before entering Rosario Strait.  
 161.174 Entering Rosario Strait.

#### DESCRIPTIONS AND GEOGRAPHIC COORDINATES

- 161.180 VTS Area.  
 161.183 Separation zones.  
 161.185 Traffic lanes.  
 161.187 Precautionary areas.  
 161.188 Temporary precautionary areas.  
 161.189 Reporting points.

**AUTHORITY:** Sec. 104, Pub. L. 92-340, 86 Stat. 424 (33 U.S.C. 1224); 37 FR 21943, 49 CFR 1.46(o)(4)<sup>1</sup>

**SOURCE:** CGD 73-158R, 39 FR 25431, July 10, 1974, unless otherwise noted.

#### Subpart A—[Reserved]

#### Subpart B—Puget Sound Vessel Traffic System

##### GENERAL RULES

###### § 161.101 Purpose and Applicability.

(a) This subpart prescribes rules for vessel operation in the Puget Sound vessel traffic system area (VTS Area) to prevent collisions and groundings and to protect the navigable waters of the VTS Area from environmental harm resulting from collisions and groundings.

(b) The General Rules in §§ 161.101-161.111 and the TSS Rules in §§ 161.150-161.154 and § 161.156 (b) and (c) of this subpart apply to the operation of all vessels.

(c) The Communication Rules in §§ 161.120-161.136, the Vessel Movement Reporting Rules in § 161.142, the TSS Rule in

<sup>1</sup>NOTE: Sections 106 and 107 of Public Law 92-340 (33 U.S.C. 1226-1227) prescribe civil and criminal penalties for violations of the rules in this part.

§ 161.156(a), and the Rosario Strait Rules in §§ 161.170-161.174 of this subpart apply only to the operation of—

- (1) Each vessel of 300 or more gross tons that is propelled by machinery;
- (2) Each vessel of 100 or more gross tons that is carrying one or more passengers for hire;
- (3) Each commercial vessel of 26 feet or over in length engaged in towing another vessel astern, alongside, or by pushing ahead; and
- (4) Each dredge and floating plant.

###### § 161.103 Definitions.

As used in this subpart—

(a) "Vessel traffic center" (VTC) means the shore based facility that operates the Puget Sound vessel traffic system.

(b) "Vessel traffic system area" (VTS Area) means the area described in § 161.180 of this part.

(c) "Traffic separation scheme" (TSS) means the network of traffic lanes, separation zones, and precautionary areas in the VTS Area.

(d) "Traffic lane" means an area of the TSS in which all vessels ordinarily proceed in the same direction.

(e) "Separation zone" means an area of the TSS that is located between two traffic lanes to keep vessels proceeding in opposite directions a safe distance apart.

(f) "Precautionary area" means an area of the TSS at the entrance of one or more traffic lanes where vessel traffic converges from two or more directions.

(g) "Person" includes an individual, firm, corporation, association, partnership, and governmental entity.

(h) "ETA" means estimated time of arrival.

###### § 161.104 Vessel operation in the VTS Area.

No person may cause or authorize the operation of a vessel in the VTS Area contrary to the rules in this subpart.

###### § 161.105 Laws and regulations not affected.

Nothing in this subpart is intended to relieve any person from complying with—

- (a) The Navigation Rules for Harbors, Rivers, and Inland Waters Generally (33 U.S.C. §§ 151-232);
- (b) Vessel Bridge-to-Bridge Radio-telephone Regulations (Part 26 of this chapter);
- (c) Pilot Rules for Inland Waters (Part 80 of this chapter);
- (d) Puget Sound gill net fishing rule (33 CFR 206.93);
- (e) The Federal Boat Safety Act of 1971 (46 U.S.C. 1451-1489); and
- (f) Any other laws or regulations.

**§ 161.107 VTC directions.**

(a) During conditions of vessel congestion, adverse weather, reduced visibility, or other hazardous circumstances in the VTS Area, the VTC may issue directions specifying times when vessels may enter, move within or through, or depart from ports, harbors, or other waters in the VTS Area.

(b) The master of a vessel in the VTS Area shall comply with each direction issued to him under this section.

**§ 161.109 Authorization to deviate from these rules.**

(a) The Commander, Thirteenth Coast Guard District may upon request issue an authorization to deviate from any rule in this subpart if he finds that the proposed operations under the authorization can be done safely. An application for an authorization must state the need for the authorization and describe the proposed operations.

(b) The VTC may, upon request, issue an authorization to deviate from any rule in this subpart for a voyage or part of a voyage on which a vessel is embarked or about to embark.

**§ 161.111 Emergencies.**

In an emergency, any person may deviate from any section in this subpart to the extent necessary to avoid endangering persons, property, or the environment.

## COMMUNICATION RULES

**§ 161.120 Radio listening watch.**

The master of a vessel in the VTS Area shall continuously monitor the radio frequency designated in the Puget Sound VTS Operating Manual for the sector of the VTS Area in which the vessel is operating, except when transmitting on that frequency.

**§ 161.122 Radiotelephone equipment.**

Each report required by this subpart to be made by radiotelephone must be made using a radiotelephone that is capable of operation on the navigational bridge of the vessel, or in the case of a dredge, at its main control station.

**§ 161.124 English language.**

Each report required by this subpart must be made in the English language.

**§ 161.126 Time.**

Each report required by this subpart must specify time using—

- (a) The zone time in effect in the VTS Area; and
- (b) The 24-hour clock system.

**§ 161.128 Initial report.**

At least 30 minutes before a vessel enters or begins to navigate in the VTS Area the master of the vessel shall report, or cause to be reported, the following information to the VTC:

- (a) The name of the vessel.
- (b) The position of the vessel.
- (c) The estimated time of entering or beginning to navigate in the VTS Area.
- (d) Point of entry in the VTS Area.
- (e) Destination in the VTS Area.
- (f) ETA of the vessel at its destination.
- (g) Any condition on the vessel that may affect its navigation in the VTS Area such as fire, defective propulsion machinery, or defective steering equipment.

(h) Whether or not any dangerous cargo listed in § 124.14 of this chapter is on board the vessel.

**§ 161.130 Follow-up report.**

At least 15 minutes, but not more than 45 minutes, before a vessel enters or begins to navigate in the VTS Area, the master of the vessel shall report the following information by radiotelephone to the VTC:

- (a) Name, type, length, and draft of the vessel.
- (b) Any revisions to the initial report required by § 161.128 of this subpart.
- (c) The speed at which the vessel will proceed in the VTS Area.
- (d) Any tow that the towing vessel is unable to control or can control only with difficulty.
- (e) If the vessel intends to enter the TSS, the ETA and point of entry in the TSS.

**§ 161.131 Final report.**

Whenever a vessel anchors or moors in, or departs from, the VTS Area, the master shall report, or cause to be reported, the place of anchoring, mooring, or departing to the VTC.

**§ 161.133 Radio failure.**

Whenever a vessel's radiotelephone equipment fails—

- (a) Compliance with §§ 161.120 and 161.142 of this subpart is not required; and
- (b) Compliance with §§ 161.128, 161.130, and 161.131 of this subpart is not required unless the reports required by those sections can be made by telephone.

**§ 161.134 Report of emergency or radio failure.**

Whenever the master of a vessel deviates from any section in this subpart because of an emergency or radio failure, he shall report, or cause to be reported, the deviation to the VTC as soon as possible.

**§ 161.135 Report of impairment to the operation of the vessel.**

The master of a vessel in the VTS Area shall report to the VTC as soon as possible.

(a) Any condition on the vessel that may impair its navigation such as fire, defective propulsion machinery, or defective steering equipment; and

(b) Any tow that the towing vessel is unable to control, or can control only with difficulty, unless this information has already been reported.

**§ 161.136 Ferry vessels.**

(a) Whenever a ferry vessel is operated in the VTS Area on a schedule and a route that crosses the TSS, both of which have been previously furnished to the VTC, compliance with §§ 161.128, 161.130, 161.131, and 161.142 of this subpart is not required.

(b) The master of a ferry vessel that enters the TSS at any place other than Rosario Strait between sunset and sunrise or during reduced visibility shall report the following information by radiotelephone to the VTC at least five minutes before entry:

- (1) The name of the vessel.
- (2) The direction the vessel will proceed in the TSS.
- (3) The point of entering the TSS.
- (4) The estimated time the vessel will operate in the TSS.

#### VESSEL MOVEMENT REPORTING RULES

**§ 161.142 Movement reports.**

(a) Whenever a vessel passes a reporting point listed in § 161.189 of this subpart, the master of the vessel shall report the following information to the VTC by radiotelephone:

- (1) The name of the vessel.
- (2) The reporting point.
- (3) The time of passing the reporting point.
- (4) The next reporting point.
- (5) ETA at the next reporting point.
- (6) If the vessel is at a point of entry in the TSS, any change in speed of the vessel from the speed reported under § 161.130(c) of this subpart.

(7) If the vessel is at a point of departure from the TSS, the course and the destination or intentions of the vessel.

(b) Whenever the ETA of a vessel at a reporting point changes by more than 10 minutes, the master of the vessel shall report a revised ETA to the VTC by radiotelephone.

#### TRAFFIC SEPARATION SCHEME RULES

##### § 161.150 Vessel operation in the TSS.

The master of a vessel in the TSS shall operate the vessel in accordance with the TSS rules prescribed in §§ 161.152-161.156.

##### § 161.152 Direction of traffic.

(a) A vessel proceeding in a traffic lane shall keep the separation zone to port.

(b) A vessel in a precautionary area, except the Port Angeles precautionary area or any temporary precautionary area, shall keep the center of the precautionary area to port.

##### § 161.154 Anchoring in the TSS.

No vessel may anchor in the TSS.

##### § 161.156 Joining, leaving, and crossing a traffic lane.

(a) A vessel may join, cross, or leave a traffic lane only at a precautionary area unless the VTC has been notified of the point at which the vessel will join, cross, or leave the traffic lane.

(b) A vessel crossing a traffic lane shall, to the extent possible, maintain a course that is perpendicular to the direction of the flow of traffic in the traffic lane.

(c) A vessel joining or leaving a traffic lane shall steer a course to converge on or diverge from the direction of traffic flow in the traffic lane at as small an angle as possible.

#### ROSARIO STRAIT RULES

##### § 161.170 Communications in Rosario Strait.

Before a vessel meets, overtakes, or crosses ahead of any vessel in Rosario Strait, the master shall transmit the intentions of his vessel to the master of the other vessel on the frequency designated under the Bridge-to-Bridge Radiotelephone Act for the purpose of arranging safe passage.

##### § 161.172 Report before entering Rosario Strait.

At least 15 minutes before a vessel enters the TSS at Rosario Strait, the master of the vessel shall report the vessel's ETA at, and point of entry in, Rosario Strait to the VTC by radiotelephone.

##### § 161.174 Entering Rosario Strait.

(a) A vessel may not enter Rosario Strait unless—

(1) The report required by § 161.172 of this subpart has been made;

(2) The radio equipment on the vessel that is used to transmit the reports required by this subpart is in operation;

(3) During periods of visibility of 2 miles or less, the radar on a vessel equipped with radar is in operation and manned; and

(4) The vessel is free of any conditions that may impair its navigation such as fire, defective propulsion machinery, or defective steering equipment.

(b) The master of a vessel shall operate the vessel in accordance with paragraph (a) of this section.

#### DESCRIPTIONS AND GEOGRAPHIC COORDINATES

##### § 161.180 VTS Area.

The VTS Area consists of the navigable waters of the United States inshore of the boundary line of inland waters described in § 82.120 of this chapter. This area includes the waters in the Strait of Georgia, Haro Strait, and the Strait of Juan de Fuca that are east of the line of demarcation, and Rosario Strait, Bellingham Bay, Padilla Bay, Admiralty Inlet, Puget Sound, Possession Sound, Elliot Bay, Hood Canal, Commencement Bay, the Narrows west of Tacoma, Carr Inlet, Case Inlet, and navigable waters adjacent to these areas.

##### § 161.183 Separation zones.

(a) Each separation zone is 500 yards wide and centered on a line that extends from one point to another, or through several points, described in paragraph (c) of this section.

(b) Two boundaries of each separation zone are parallel to its centerline and extend to and intersect with the boundary of

a precautionary area. No part of any separation zone is contained in a precautionary area.

(c) The latitude and longitude describing the centerline of the separation zone are:

- (1) Between precautionary area "S" and "SA",
  - (i)  $48^{\circ}12'22''$  N.  $123^{\circ}06'30''$  W.
  - (ii)  $48^{\circ}11'35''$  N.  $122^{\circ}51'55''$  W.
- (2) Between precautionary area "R" and "RA",
  - (i)  $48^{\circ}16'26''$  N.  $123^{\circ}06'30''$  W.
  - (ii)  $48^{\circ}19'06''$  N.  $123^{\circ}00'09''$  W.
- (3) Between precautionary area "RA" and "SA",
  - (i)  $48^{\circ}18'45''$  N.  $122^{\circ}57'30''$  W.
  - (ii)  $48^{\circ}12'40''$  N.  $122^{\circ}51'01''$  W.
- (4) Between precautionary area "RA" and "RB",
  - (i)  $48^{\circ}20'26''$  N.  $122^{\circ}57'01''$  W.
  - (ii)  $48^{\circ}24'14''$  N.  $122^{\circ}48'00''$  W.
  - (iii)  $48^{\circ}25'28''$  N.  $122^{\circ}46'23''$  W.
- (5) Between precautionary area "RB" and "SA",
  - (i)  $48^{\circ}25'12''$  N.  $122^{\circ}44'40''$  W.
  - (ii)  $48^{\circ}24'10''$  N.  $122^{\circ}44'12''$  W.
  - (iii)  $48^{\circ}12'52''$  N.  $122^{\circ}49'03''$  W.
- (6) Between precautionary area "SA" and "SC",
  - (i)  $48^{\circ}10'43''$  N.  $122^{\circ}47'50''$  W.
  - (ii)  $48^{\circ}07'43''$  N.  $122^{\circ}30'56''$  W.
  - (iii)  $48^{\circ}01'43''$  N.  $122^{\circ}38'02''$  W.
- (7) Between precautionary area "SC" and "SF",
  - (i)  $48^{\circ}00'36''$  N.  $122^{\circ}37'24''$  W.
  - (ii)  $47^{\circ}57'21''$  N.  $122^{\circ}34'12''$  W.
  - (iii)  $47^{\circ}55'24''$  N.  $122^{\circ}30'16''$  W.
  - (iv)  $47^{\circ}53'39''$  N.  $122^{\circ}28'21''$  W.
- (8) Between precautionary area "SF" and "SH",
  - (i)  $47^{\circ}52'34''$  N.  $122^{\circ}27'40''$  W.
  - (ii)  $47^{\circ}44'31''$  N.  $122^{\circ}25'41''$  W.
  - (iii)  $47^{\circ}40'18''$  N.  $122^{\circ}27'33''$  W.
- (9) Between precautionary area "SH" and "T",
  - (i)  $47^{\circ}39'05''$  N.  $122^{\circ}27'42''$  W.
  - (ii)  $47^{\circ}34'54''$  N.  $122^{\circ}26'54''$  W.
- (10) Between precautionary area "T" and "TC",
  - (i)  $47^{\circ}33'42''$  N.  $122^{\circ}26'33''$  W.
  - (ii)  $47^{\circ}26'53''$  N.  $122^{\circ}24'12''$  W.

- (iii)  $47^{\circ}23'07''$  N.  $122^{\circ}21'08''$  W.
  - (iv)  $47^{\circ}19'54''$  N.  $122^{\circ}26'37''$  W.
- Between precautionary area "CA" and "C",
- (i)  $48^{\circ}44'15''$  N.  $122^{\circ}45'39''$  W.
  - (ii)  $48^{\circ}41'39''$  N.  $122^{\circ}43'34''$  W.

#### § 161.185 Traffic lanes.

(a) Except as provided in paragraph (c) of this section, each traffic lane consists of the area within two parallel boundaries that are 1000 yards apart and that extend to and intersect with the boundary of a precautionary area. One of these parallel boundaries is parallel to and 250 yards from the centerline of a separation zone.

(b) No part of any traffic lane is contained in a precautionary area.

(c) The traffic lane in Rosario Strait consists of the area enclosed by a line beginning at latitude  $48^{\circ}26'50''$  N., longitude  $122^{\circ}43'27''$  W.; thence northerly to latitude  $48^{\circ}36'06''$  N., longitude  $122^{\circ}44'56''$  W.; thence northeasterly to latitude  $48^{\circ}39'18''$  N., longitude  $122^{\circ}42'42''$  W.; thence westerly and northwesterly along the boundary of precautionary area "C" to latitude  $48^{\circ}39'37''$  N., longitude  $122^{\circ}43'58''$  W.; thence southerly to latitude  $48^{\circ}38'24''$  N., longitude  $122^{\circ}44'08''$  W.; thence southwesterly to latitude  $48^{\circ}36'08''$  N., longitude  $122^{\circ}45'44''$  W.; thence southerly to latitude  $48^{\circ}29'30''$  N., longitude  $122^{\circ}44'41''$  W.; thence southwesterly to latitude  $48^{\circ}27'37''$  N., longitude  $122^{\circ}45'27''$  W.; thence northeasterly and southeasterly along the boundary of precautionary area "RB" to the point of beginning.

#### § 161.187 Precautionary areas.

The precautionary areas consist of:

(a) *Port Angeles precautionary area.* An area enclosed by a line beginning on the shoreline at New Dungeness Spit at latitude  $48^{\circ}11'00''$  N., longitude  $123^{\circ}06'30''$  W.; thence due north to latitude  $48^{\circ}17'10''$  N., longitude  $123^{\circ}06'30''$  W.; thence southwesterly to latitude  $48^{\circ}10'00''$  N., longitude  $123^{\circ}27'38''$  W.; thence due south to the shorelines; thence along the shoreline to the point of beginning.

(b) *Precautionary area "RA"*. A circular area of 2,500 yards radius centered at latitude 48°19'46" N., longitude 122°58'34" W.;

(c) *Precautionary area "RB"*. A circular area of 2,500 yards radius centered at latitude 48°26'24" N., longitude 122°45'12" W.;

(d) *Precautionary area "C"*. A circular area of 2,500 yards radius centered at latitude 48°40'34" N., longitude 122°42'44" W.;

(e) *Precautionary area "CA"*. A circular area of 2,500 yards radius centered at latitude 48°45'19" N., longitude 122°46'26" W.;

(f) *Precautionary area "SA"*. A circular area of 3,000 yards radius centered at latitude 48°11'28" N., longitude 122°49'43" W.;

(g) *Precautionary area "SC"*. A circular area of 1,250 yards radius centered at latitude 48°01'06" N., longitude 122°37'54" W.;

(h) *Precautionary area "SF"*. A circular area of 1,250 yards radius centered at latitude 47°53'10" N., longitude 122°27'48" W.;

(i) *Precautionary area "SH"*. A circular area of 1,250 yards radius centered at latitude 47°39'42" N., longitude 122°27'48" W.;

(j) *Precautionary area "T"*. A circular area of 1,250 yards radius centered at latitude 47°34'19" N., longitude 122°26'47" W.;

(k) *Precautionary area "TC"*. A circular area of 1,250 yards radius centered at latitude 47°19'30" N., longitude 122°27'19" W.

#### **§ 161.188 Temporary precautionary areas.**

The Commander, Thirteenth Coast Guard District, may amend the description of the TSS in §§ 161.180-161.189 of this subpart to establish temporary precautionary areas to provide for seasonal activities such as fishing that affect the safe passage of vessels in the TSS.

#### **§ 161.189 Reporting points.**

The reporting points are—

- (a) Buoy "R" at latitude 48°16'26" N., longitude 123°06'30" W.
- (b) Buoy "S" at latitude 48°12'22" N., longitude 123°06'30" W.
- (c) Buoy "SA" at latitude 48°11'28" N., longitude 122°49'43" W.
- (d) Buoy "RB" at latitude 48°26'24" N., longitude 122°45'12" W.
- (e) Buoy "C" at latitude 48°40'34" N., longitude 122°42'44" W.
- (f) Buoy "SC" at latitude 48°01'06" N., longitude 122°37'54" W.
- (g) Buoy "SH" at latitude 47°39'42" N., longitude 122°27'48" W.
- (h) Buoy "TB" at latitude 47°23'07" N., longitude 122°21'08" W.
- (i) The boundary of the TSS.

**EXHIBIT U**  
DEPARTMENT OF TRANSPORTATION  
COAST GUARD  
VESSEL TRAFFIC SYSTEM  
PUGET SOUND  
OPERATING MANUAL  
SEPTEMBER 1974

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

**INTRODUCTION**

This manual is intended to provide the user with information necessary for participation in the Puget Sound Vessel Traffic System. It contains the rules and regulations which delineate the system, and which are published in Subchapter P, Title 33, Code of Federal Regulations. It also contains supplementary text which is intended to be explanatory in nature. This manual is not intended to conflict with or modify the regulations in any respect, and any apparent conflict should be resolved in favor of the regulations. The Coast Guard will keep the manual current with any permanent changes issued to the regulations. Changes of a temporary nature will be promulgated by the Commander, Thirteenth Coast Guard District, in notices to mariners, and will not be incorporated in this operating manual.

In several respects, the regulations contained herein are applicable to *all* vessels, no matter the size, operating in the Puget Sound Vessel Traffic System Area. Other regulations in the manual are applicable only to vessels of certain length or tonnage. Therefore, it is incumbent upon the operator of any vessel in this area to be familiar with the requirements of the regulations for the particular type vessel being operated. Public Law 92-340 prescribes civil and criminal penalties for violations of the regulations in this part. The maximum civil penalty is \$10,000. The criminal penalty for a willful violation is a fine of not less than \$5,000 nor more than \$50,000 and/or imprisonment for not more than 5 years.

The Puget Sound Vessel Traffic System is comprised of two major components, a traffic separation scheme, and a vessel movement reporting system. The traffic separation scheme comprises a network of one-way traffic lanes, separation zones in between, and precautionary areas. The traffic lanes are each 1,000 yards wide, and are separated by 500 yard wide separation zones. Each traffic lane has a minimum depth of 60 feet (except 40 feet off the east end of Partridge Bank).

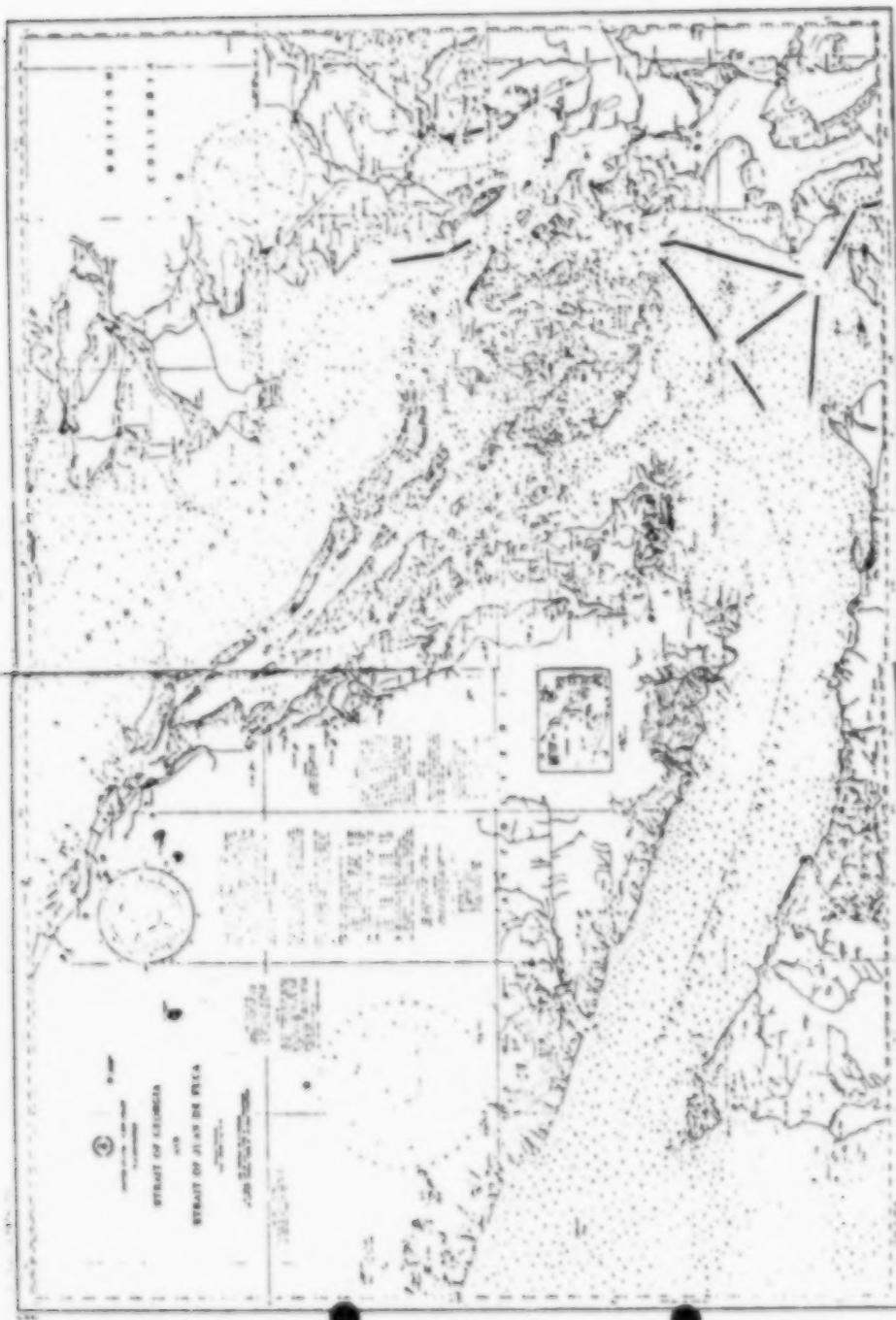
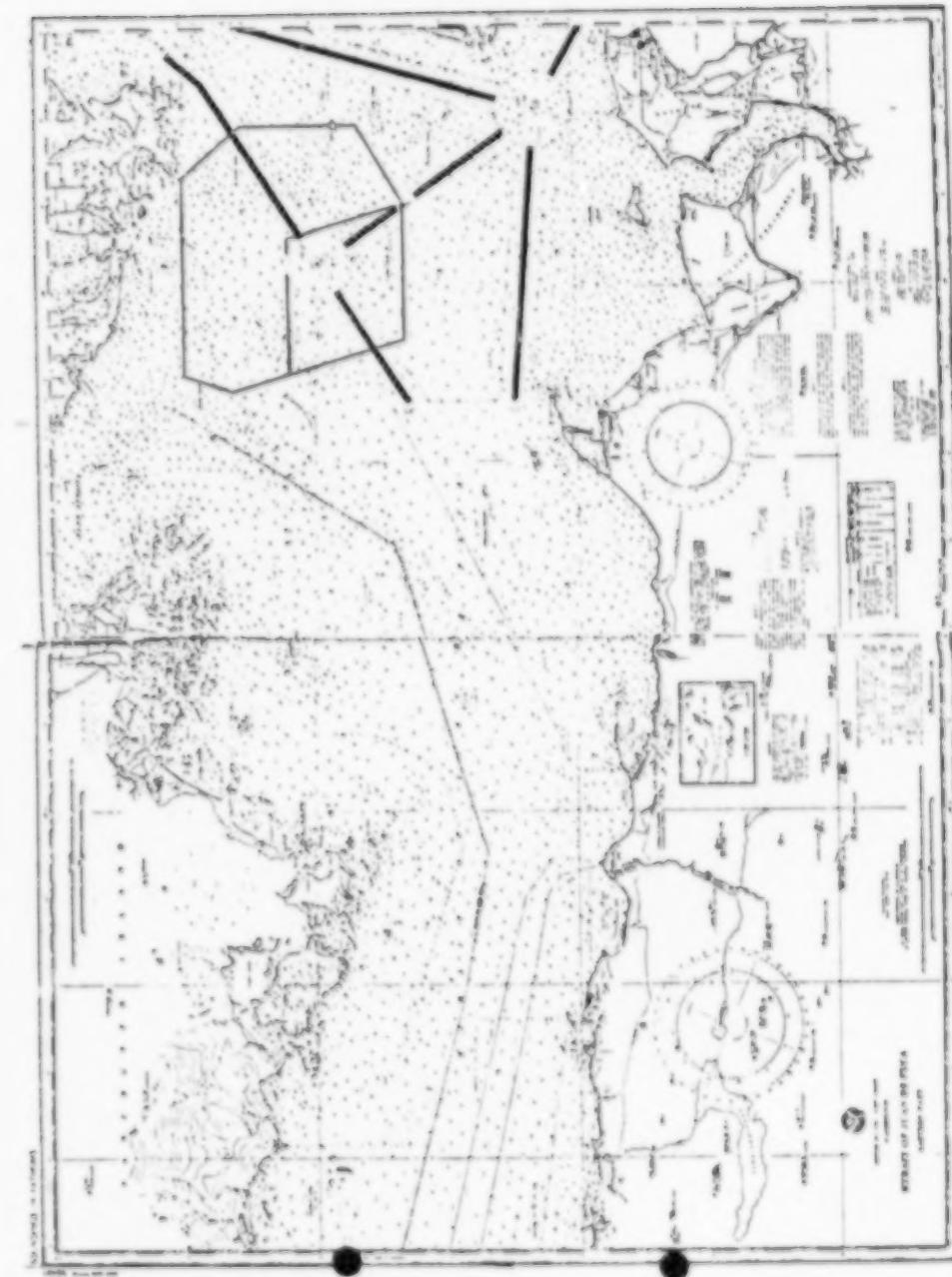
The vessel movement reporting system is based upon a VHF-FM communications network maintained continuously by the Coast Guard Vessel Traffic Center in Seattle. This center will process information received from vessels in required and voluntary reports, and will, in turn, disseminate navigational safety information to vessels participating in the system. The mariner is cautioned that information provided by the vessel traffic center is, to a large extent, generated from these reports by vessels and can be no more accurate than that received. Additionally, the Coast Guard may not have first hand knowledge of hazardous circumstances existing in the Vessel Traffic System Area, and unreported hazards may confront the mariner at any time.

The Coast Guard welcomes any suggestions for improvement to this manual or to the Puget Sound Vessel Traffic System.

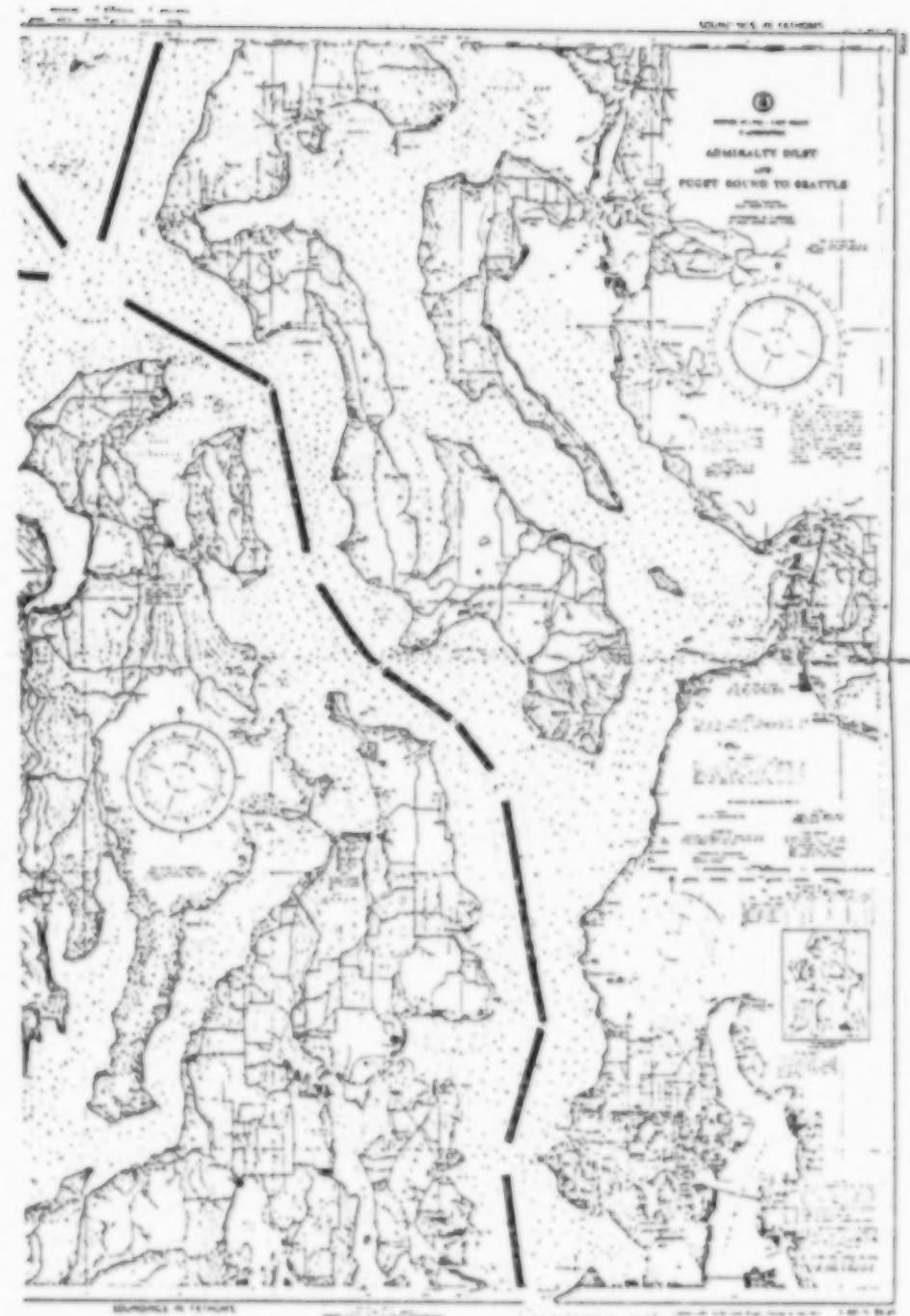
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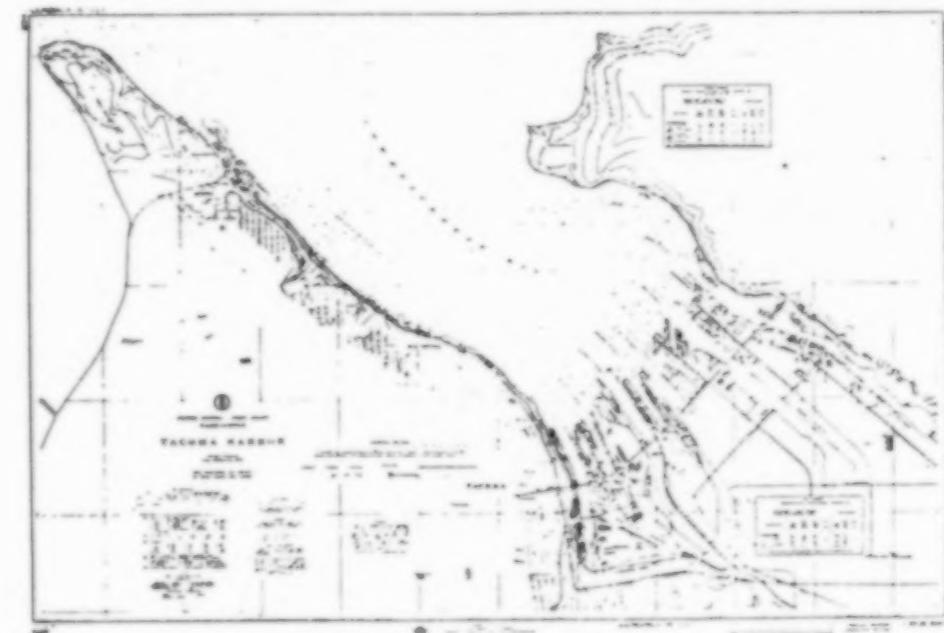
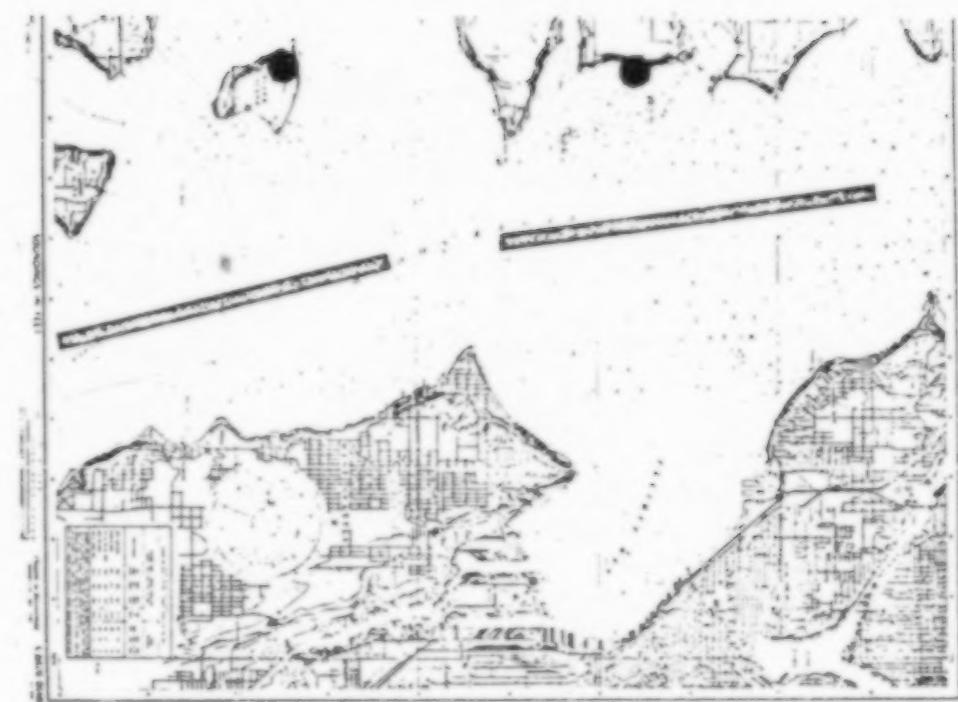
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#### CHARTLETS OF THE VESSEL TRAFFIC SYSTEM AREA

*Exhibit U**Exhibit U*

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*Exhibit U**Exhibit U*



## NAVIGATION AND NAVIGABLE WATERS

### TITLE 33, CODE OF FEDERAL REGULATIONS

#### PART 161—Vessel Traffic Systems

##### Subpart A—[Reserved]

##### Subpart B—Puget Sound Vessel Traffic System

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- 161.103 Definitions.
- 161.104 Vessel operation in the VTS Area.
- 161.105 Laws and regulations not affected.
- 161.107 VTC directions.
- 161.109 Authorization to deviate from these rules.
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###### COMMUNICATION RULES

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- 161.142 Movement reports.

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- 161.150 Vessel operation in the TSS.
- 161.152 Direction of traffic.
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- 161.183 Separation zones.
- 161.185 Traffic lanes.
- 161.187 Precautionary areas.
- 161.188 Temporary precautionary areas.
- 161.189 Reporting points.

**AUTHORITY:** Sec. 104, Pub. L. 92-340, 86 Stat. 424 (33 U.S.C. 1224); 37 FR 21943, 49 CFR 1.46(o)(4)

##### Subpart A—[Reserved] Subpart B—Puget Sound Vessel Traffic System

Where necessary to amplify a particular section, supplemental text will immediately follow that section in indented and solid type. The supplemental text is not part of the regulation it amplifies.

###### GENERAL RULES

- § 161.101 Purpose and Applicability.
  - (a) This subpart prescribes rules for vessel operation in the Puget Sound Vessel Traffic System Area (VTS Area) to prevent

collisions and groundings and to protect the navigable waters of the VTS Area from environmental harm resulting from collisions and groundings.

(b) The General Rules in §§ 161.101-161.111 and the TSS Rules in §§ 161.150-161.154 and § 161.156(b) and (c) of this subpart apply to the operation of all vessels.

(c) The Communication Rules in §§ 161.120-161.136, the Vessel Movement Reporting Rules in § 161.142, the TSS Rule in § 161.156(a), and the Rosario Strait Rules in §§ 161.170-161.174 of this subpart apply only to the operation of—

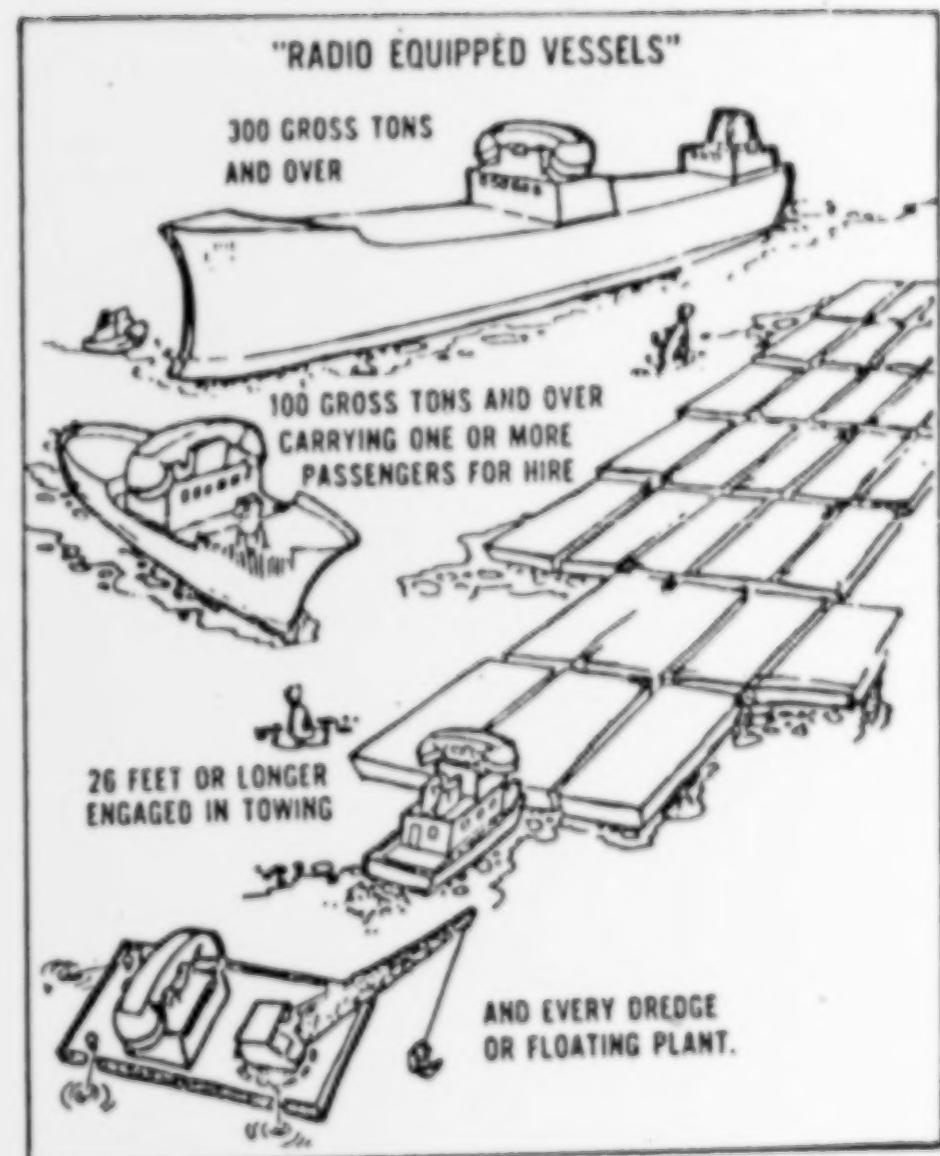
(1) Each vessel of 300 or more gross tons that is propelled by machinery;

(2) Each vessel of 100 or more gross tons that is carrying one or more passengers for hire;

(3) Each commercial vessel of 26 feet or over in length engaged in towing another vessel astern, alongside; or by pushing ahead; and

(4) Each dredge and floating plant.

For the purposes of brevity, the vessels described in Sections 161.101(c)(1) through (4) above will be referred to as "radio equipped vessels" in the supplemental text of this manual. The primary users of the VTS will be "radio equipped vessels." However, within the capacity of the system, all possible assistance concerning safety of navigation will be furnished to any participating vessel in the VTS Area.



#### § 161.103 Definitions.

As used in this subpart—

(a) "Vessel traffic center" (VTC) means the shore based facility that operates the Puget Sound vessel traffic system.

(b) "Vessel traffic system area" (VTS Area) means the area described in § 161.180 of this part.

(c) "Traffic separation scheme" (TSS) means the network of traffic lanes, separation zones, and precautionary areas in the VTS Area.

(d) "Traffic lane" means an area of the TSS in which all vessels ordinarily proceed in the same direction.

(e) "Separation zone" means an area of this TSS that is located between two traffic lanes to keep vessels proceeding in opposite directions a safe distance apart.

(f) "Precautionary area" means an area of the TSS at the entrance of one or more traffic lanes where vessel traffic converges from two or more directions.

(g) "Person" includes an individual, firm, corporation, association, partnership, and governmental entity.

(h) "ETA" means estimated time of arrival.

#### **§ 161.104 Vessel operation in the VTS Area.**

No person may cause or authorize the operation of a vessel in the VTS Area contrary to the rules in this subpart.

#### **§ 161.105 Laws and regulations not affected.**

Nothing in this subpart is intended to relieve any person from complying with—

(a) The Navigation Rules for Harbors, Rivers, and Inland Waters Generally (33 U.S.C. §§ 151-232);



(b) Vessel Bridge-to-Bridge Radiotelephone Regulations (Part 26 of this chapter);

(c) Pilot Rules for Inland Waters (Part 80 of this chapter);

(d) Puget Sound gill net fishing rule (33 CFR 206.93);

(e) The Federal Boat Safety Act of 1971 (46 U.S.C. 1451-1489); and

(f) Any other laws or regulations.

**§ 161.107 VTC directions**

(a) During conditions of vessel congestion, adverse weather, reduced visibility, or other hazardous circumstances in the VTS Area, the VTC may issue directions specifying times when vessels may enter, move within or through, or depart from ports, harbors, or other waters in the VTS Area.

(b) The master of a vessel in the VTS Area shall comply with each direction issued to him under this section.

The Coast Guard wishes to stress that under normal circumstances the VTC will exercise no direct control over vessel movements in the VTS Area. However, when the situation dictates, the Coast Guard will exert control over vessel movements by invoking this regulation. Responsibility of the master or pilot for safe navigation and prudent maneuvering of his vessel is in no way lessened by this regulation.

**§ 161.109 Authorization to deviate from these rules.**

(a) The Commander, Thirteenth Coast Guard District may upon request issue an authorization to deviate from any rule in this subpart if he finds that the proposed operations under the authorization can be done safely. An application for an authorization must state the need for the authorization and describe the proposed operations.

(b) The VTC may, upon request, issue an authorization to deviate from any rule in this subpart for a voyage or part of a voyage on which a vessel is embarked or about to embark.

Requests to deviate from any rule are to be submitted in writing for paragraph (a) and orally for paragraph (b). Written requests could be, for example, a request for a class or group of vessels to be exempt or deviate from a particular rule indefinitely or for an extended period of time. As an example of an oral request to the VTC, the master of a vessel who determines that his vessel should not transit the south-bound lane past the shoal at Partridge Bank may obtain authorization from the VTC to navigate in the separation zone or northbound traffic lane. Since this authorization is

dependent on other traffic in the area, subsequent requests for the same deviation from the rules must again be authorized by the VTC.

**§ 161.111 Emergencies.**

In an emergency, any person may deviate from any section in this subpart to the extent necessary to avoid endangering persons, property, or the environment.

When necessary to deviate from the rules for reasons of safety, the master of a vessel shall report or cause to be reported, the deviation to the VTC as soon as possible. (section 161.134)

**COMMUNICATION RULES**

The rules in sections 161.120 through 161.136 below apply to "radio equipped vessels."

**§ 161.120 Radio listening watch.**

The master of a vessel in the VTS Area shall continuously monitor the radio frequency designated in the Puget Sound VTS Operating Manual for the sector of the VTS Area in which the vessel is operating, except when transmitting on that frequency.

VHF-FM Channel 13 (156.65 MHz) has been designated as the radiotelephone frequency for the entire VTS Area, and will be used to transmit and receive vessel movement data, and other maritime safety information. The VTC will maintain a continuous guard on this frequency and on VHF-FM Channel 16 (156.8 MHz), the National Distress, Safety, and Calling Frequency. SEATTLE TRAFFIC is the radio sign. Radio procedure will be in accordance with the Radio Regulations promulgated by the International Telecommunications Union. Sample message formats are provided in Appendix C.



Four remote receiver/transmitter sites are located around the Puget Sound area for total coverage:

1. Bahokus Peak ..... Cape Flattery ..... 1600 ft
2. Mount Constitution ..... Orcas Island ..... 2750 ft
3. Gold Mountain ..... Kitsap Peninsula .... 1900 ft
4. West Point ..... Seattle ..... 100 ft

Each transmitter has a range of approximately 50 miles and is keyed remotely from the Vessel Traffic Center in Seattle.

To preclude the probability that calls from the many small craft on the sound may overload the Vessel Traffic System and Bridge-to-Bridge Radiotelephone Frequency, recreational vessels are requested to minimize communica-

tions with the Vessel Traffic Center on channel 13. Those recreational craft that have the capability to guard two channels simultaneously are encouraged to monitor channel 13 when actually navigating within a traffic lane or precautionary area. Passive monitoring of channel 13 will yield much information on major vessel movements, special operations, the status of aids to navigation, etc., without congesting the frequency.

#### § 161.122 Radiotelephone equipment.

Each report required by this subpart to be made by radiotelephone must be made using a radiotelephone that is capable of operation on the navigational bridge of the vessel, or in the case of a dredge, at its main control station.

#### § 161.124 English language.

Each report required by this subpart must be made in the English language.



**§ 161.126 Time.**

Each report required by this subpart must specify time using—

- (a) The zone time in effect in the VTS Area; and
- (b) The 24-hour clock system.

**§ 161.128 Initial report.**

At least 30 minutes before a vessel enters or begins to navigate

in the VTS Area the master of the vessel shall report, or cause to be reported, the following information to the VTC:

- (a) The name of the vessel.
- (b) The position of the vessel.
- (c) The estimated time of entering or beginning to navigate in the VTS Area.
- (d) Point of entry in the VTS Area.
- (e) Destination in the VTS Area.
- (f) ETA of the vessel at its destination.
- (g) Any condition on the vessel that may affect its navigation in the VTS Area such as fire, defective propulsion machinery, or defective steering equipment.
- (h) Whether or not any dangerous cargo listed in § 124.14 of this chapter is on board the vessel.

**§ 161.130 Follow-up report.**

At least 15 minutes, but not more than 45 minutes, before a vessel enters or begins to navigate in the VTS Area, the master of the vessel shall report the following information by radiotelephone to the VTC:

- (a) Name, type, length, and draft of the vessel.
- (b) Any revisions to the initial report required by § 161.128 of this subpart.
- (c) The speed at which the vessel will proceed in the VTS Area.
- (d) Any tow that the towing vessel is unable to control or can control only with difficulty.
- (e) If the vessel intends to enter the TSS, the ETA and point of entry in the TSS.

Reported vessel speed should be speed over the ground.

At the discretion of the master, the initial and follow-up reports may be combined and given at one time, provided they are made within the time limitations as stated above for the follow-up report. For example, the initial report may be made one hour prior to entering the VTS Area. The follow-up report may not be made at the same time because the follow-up report time limitations would not be met.

Both reports are required for a vessel changing berths in a port. If the master is not on board or is unable to make the reports himself, he still has the responsibility to ensure that these reports are made in his absence.

Should a vessel not carry out her intended plans reported in the above reports within the allotted time, revised reports must be initiated.

As each vessel checks into the system or reports at a reporting point, the VTC will advise that vessel or other traffic for a specific section of channel, and radio traffic permitting, will give a listing of vessels in sequence, with their plotted positions, destination and speed upon request.

#### **§ 161.131 Final report.**

Whenever a vessel anchors or moors in, or departs from, the VTS Area, the master shall report, or cause to be reported, the place of anchoring, mooring, or departing to the VTC.

Where a vessel has moored or anchored in the VTS Area, its estimated time of next movement should be included in this report.

The master of a vessel in the VTS Area should report by radiotelephone to the VTC any hazardous circumstances whenever observed unless they are known to have been previously reported. These include the following:

- (a) Concentrations of fishing vessels.
- (b) Reduced visibility or other adverse weather conditions.
- (c) Concentrations of floating logs or other obstructions.
- (d) Any defect in an aid to navigation.
- (e) Any defect observed on another vessel that may affect the navigation of that vessel in the VTS Area.

Regattas may occur within portions of the Vessel Traffic System lanes at any time throughout the year. The VTC will normally be in contact with the regatta officials. The general position of the regatta will be passed to affected users of the Vessel Traffic System by the VTC.

Experience in Puget Sound is that concentrations of fishing vessels are attracted to some areas during certain periods such that the possibility of interference and the potential for accidents are increased significantly. Pursuant to State law, the State of Washington prescribes areas of Puget Sound and adjacent State waters where commercial salmon fishing is permitted from time to time. Some areas are closed permanently to fishing. Not all areas are open to fishing at the same time and, when open, not all modes of fishing are always permissible. Thus concentrations of fishing vessels will appear from time to time at varied locations

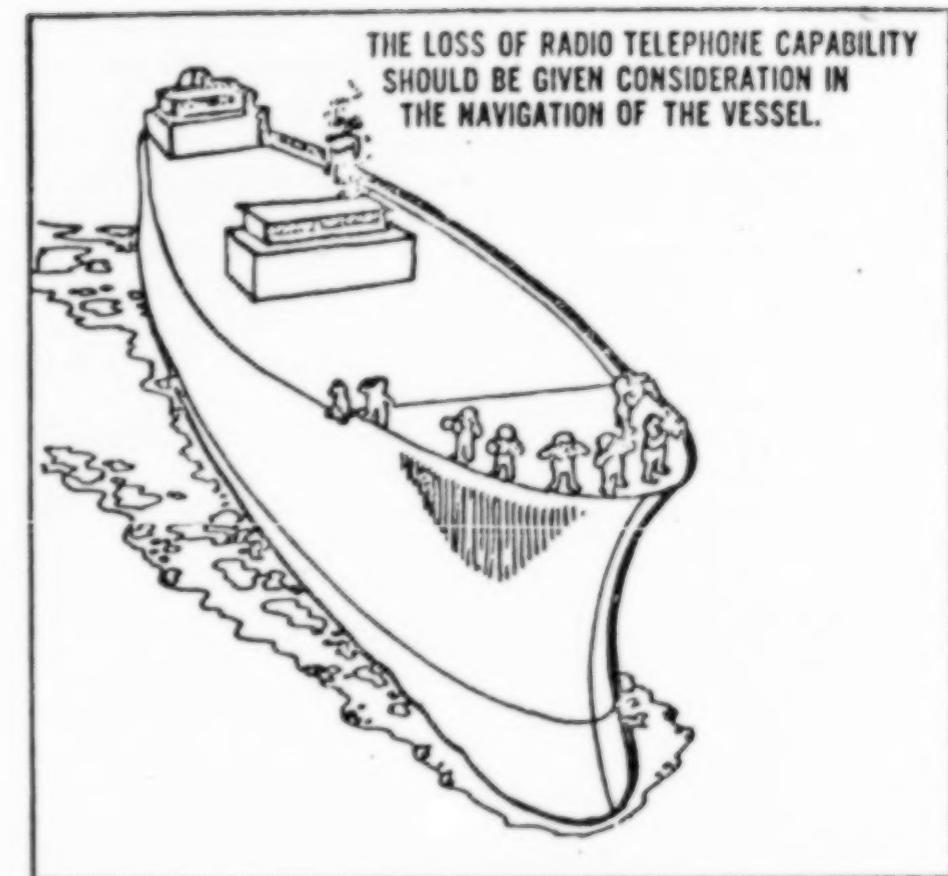
according to changes made by the State in fishing rules. These changes are made frequently and sometimes on short notice. The "open season" for a particular fishing mode in a particular area is repeated periodically, often weekly, for a period of one or more months. The VTC will advise users of the Vessel Traffic System of expected concentrations of fishing vessels along their proposed route. Unusual concentrations of fishing vessels or other non-participants should be reported to the VTC as observed by participating vessels. This will update the VTC knowledge of marine activities and supplement information available for broadcast.

#### **§ 161.133 Radio failure.**

Whenever a vessel's radiotelephone equipment fails—

- (a) Compliance with §§ 161.120 and 161.142 of this subpart is not required; and
- (b) Compliance with §§ 161.128, 161.130, and 161.131 of this subpart is not required unless the reports required by those sections can be made by telephone.

In the event of radiotelephone failure, a vessel is not required to maintain a radio listening watch on channel 13, and is not required to make movement reports. The initial, follow-up, and final reports are required to be made by telephone, if possible. However, if the radiotelephone equipment carried aboard a vessel ceases to operate, the master should exercise due diligence to restore it or cause it to be restored to effective operating condition at the earliest practicable time.



**§ 161.134 Report of emergency or radio failure.**

Whenever the master of a vessel deviates from any section in this subpart because of an emergency or radio failure, he shall report, or cause to be reported, the deviation to the VTC as soon as possible.

**§ 161.135 Report of impairment to the operation of the vessel.**

The master of a vessel in the VTS Area shall report to the VTC as soon as possible:

(a) Any condition on the vessel that may impair its navigation such as fire, defective propulsion machinery, or defective steering equipment; and

(b) Any tow that the towing vessel is unable to control, or can control only with difficulty, unless this information has already been reported.

**§ 161.136 Ferry vessels.**

(a) Whenever a ferry vessel is operated in the VTS Area on a schedule and a route that crosses the TSS, both of which have been previously furnished to the VTC, compliance with §§ 161.128, 161.130, 161.131, and 161.142 of this subpart is not required.

(b) The master of a ferry vessel that enters the TSS at any place other than Rosario Strait between sunset and sunrise or during reduced visibility shall report the following information by radiotelephone to the VTC at least five minutes before entry:

- (1) The name of the vessel.
- (2) The direction the vessel will proceed in the TSS.
- (3) The point of entering the TSS.
- (4) The estimated time the vessel will operate in the TSS.

Several ferry crossings exist throughout the Vessel Traffic System Area. These include:

1. Port Angeles .....	Victoria, B. C.
2. Anacortes .....	San Juan Islands
3. Port Townsend .....	Keystone
4. Mukilteo .....	Columbia Beach
5. Edmonds .....	Kingston
6. Seattle .....	Winslow
7. Seattle .....	Bremerton
8. Fauntleroy .....	Vashon Island
9. Point Defiance .....	Vashon Island

Upon request, ferries will be advised of other vessels in their vicinity. During periods of darkness and low visibility the VTC will inform participating vessels of ferry crossings upon request or when the VTC considers such information to be appropriate to the situation.

**VESSEL MOVEMENT REPORTING RULES**

Section 161.142 below applies to "radio equipped vessels."

**§ 161.142 Movements reports.**

(a) Whenever a vessel passes a reporting point listed in § 161.189 of this subpart, the master of the vessel shall report the following information to the VTC by radiotelephone:

- (1) The name of the vessel.

- (2) The reporting point.

- (3) The time of passing the reporting point.

- (4) The next reporting point.

- (5) ETA at the next reporting point.

(6) If the vessel is at a point of entry in the TSS, any change in speed of the vessel from the speed reported under § 161.130(c) of this subpart.

(7) If the vessel is at a point of departure from the TSS, the course and the destination or intentions of the vessel.

(b) Whenever the ETA of a vessel at a reporting point changes by more than 10 minutes, the master of the vessel shall report a revised ETA to the VTC by radiotelephone.

Reports transmitted to the VTC are the primary source of data for the Vessel Traffic System. As a vessel intending to or required to participate in the Puget Sound VTS enters the VTS Area, it should report movement information as precisely as possible so that an accurate dead reckoning plot of the vessel's passage can be maintained by the VTC.

The reporting points are as follows:

When North of New Dungeness Light.... (Buoy R)

When Northeast of Colville Point..... (Buoy RB)

When Northeast of Lawrence Point ..... (Buoy C)

When abeam of New Dungeness Light ... (Buoy S)

When Southwest of Point Partridge

Light ..... (Buoy SA)

When Southwest of Bush Point Light .. (Buoy SC)

When West of West Point Light ..... (Buoy SH)

When abeam of Robinson Point ..... (Buoy TB)

When at the limits of the TSS

**TRAFFIC SEPARATION SCHEME RULES**

With the exception of Section 161.156(a), which requires a radio report and, therefore, applies only to "radio equipped vessels", the TSS Rules below apply to all vessels in the TSS.

**§ 161.150 Vessel operation in the TSS.**

The master of a vessel in the TSS shall operate the vessel

in accordance with the TSS rules prescribed in §§ 161.152-161.156.

Masters of "radio equipped vessels" are strongly encouraged to navigate within the traffic separation scheme, even though they are not required by regulations to do so. Any vessel choosing to navigate in the TSS must follow the TSS Rules.

#### § 161.152 Direction of traffic.

(a) A vessel proceeding in a traffic lane shall keep the separation zone to port.

(b) A vessel in a precautionary area, except the Port Angeles precautionary area or any temporary precautionary area, shall keep the center of the precautionary area to port.

The center of each circular precautionary area is marked by a black and white vertically striped lighted buoy. Section 161.188 provides for the designation of temporary precautionary areas.

#### § 161.154 Anchoring in the TSS.

No vessel may anchor in the TSS.

#### § 161.156 Joining, leaving, and crossing a traffic lane.

(a) A vessel may join, cross, or leave a traffic lane only at a precautionary area unless the VTC has been notified of the point at which the vessel will join, cross, or leave the traffic lane.

(b) A vessel crossing a traffic lane shall, to the extent possible, maintain a course that is perpendicular to the direction of the flow of traffic in the traffic lane.

(c) A vessel joining or leaving a traffic lane shall steer a course to converge on or diverge from the direction of traffic flow in the traffic lane at as small an angle as possible.

*Small vessel operation in proximity to the TSS.* The Puget Sound area and the waters of the Pacific Northwest have historically supported and presently support a valuable fishery (both commercial and by rod and reel) and a large and ever increasing recreational fleet, both sail and power. There are seven important commercial seaports in Puget Sound. The establishment of the Puget Sound VTS and the Puget Sound VTS Regulations is a major effort of the U.S.

Coast Guard to ensure all of these diverse interests the continued use of these waters while minimizing danger of collisions or groundings that might subject the navigable waters of this beautiful area to environmental harm.

The majority of commercial traffic under the Puget Sound VTS Regulations will follow nautical "traffic lanes" as shown on the current large and small scale nautical charts for this area.

Small vessels should not impede the passage of "radio equipped vessels" in the traffic lanes. The operator of each small vessel in the VTS Area is bound by law to observe the regulations for the TSS in this operating manual and the statutory Inland Rules of the Road which apply everywhere within the VTS Area.

Specifically, sections 161.150 through 161.156 govern the operation of small craft in the TSS, prescribing the direction of traffic, and prohibiting anchoring in the TSS.

In addition to the TSS rules, the statutory Inland Rules of the Road and the Puget Sound gill net fishing rule (33 CFR 206.93) also apply to small vessels in the VTS Area. Of particular significance is Article 26 of the Inland Rules of the Road which provides in part that a vessel engaged in fishing does not have the right to obstruct a fairway used by other vessels. The traffic lanes in the TSS are fairways to which Article 26 applies.

#### ROSARIO STRAIT RULES

The Rosario Strait Rules in Sections 161.170 through 161.174 below apply to "radio equipped vessels."

#### § 161.170 Communications in Rosario Strait.

Before a vessel meets, overtakes, or crosses ahead of any vessel in Rosario Strait, the master shall transmit the intentions of his vessel to the master of the other vessel on the frequency designated under the Bridge-to-Bridge Radiotelephone Act for the purpose of arranging safe passage.

#### § 161.172 Report before entering Rosario Strait.

At least 15 minutes before a vessel enters the TSS at Rosario Strait, the master of the vessel shall report the vessel's ETA at, and point of entry in, Rosario Strait to the VTC by radiotelephone.

This rule applies not only to north or south entries into

the Rosario Strait TSS, but includes east or west crossings of the TSS.

**§ 161.174 Entering Rosario Strait.**

(a) A vessel may not enter Rosario Strait unless—

(1) The report required by § 161.172 of this subpart has been made;

(2) The radio equipment on the vessel that is used to transmit the report required by this subpart is in operation;

(3) During periods of visibility of 2 miles or less, the radar on a vessel equipped with radar is in operation and manned; and

(4) The vessel is free of any conditions that may impair its navigation such as fire, defective propulsion machinery, or defective steering equipment.

(b) The master of a vessel shall operate the vessel in accordance with paragraph (a) of this section.

Separated traffic lanes do not exist within Rosario Strait as in the rest of the Vessel Traffic System. Due to the narrow width of Rosario Strait, a single lane has been established. "Radio equipped vessels" using Rosario Strait will be advised of the direction and speed of traffic in or entering the Strait. The VTC will coordinate vessel movements to avoid hazardous meetings or crossing situations. Masters and pilots are encouraged to adjust the speed of their vessels so as to limit movement of large vessels through Rosario Strait to one direction at a time. Under hazardous conditions such as reduced visibility or high winds, vessels may be required by the VTC to adjust time of arrival at Rosario Strait so as to limit movement of large vessels through Rosario Strait to one direction at a time.

It is anticipated that numerous crossing situations will occur at the Buoy "RA" precautionary area due to the convergence of vessels using Haro and Rosario Straits. The VTC will advise users of these potentially dangerous crossing situations.

#### DESCRIPTIONS AND GEOGRAPHIC COORDINATES

**§ 161.180 VTS Area.**

The VTS Area consists of the navigable waters of the United States inshore of the boundary line of inland waters described in § 82.120 of this chapter. This area includes the waters in the Strait

of Georgia, Haro Strait, and the Strait of Juan de Fuca that are east of the line of demarcation, and Rosario Strait, Bellingham Bay, Padilla Bay, Admiralty Inlet, Puget Sound, Possession Sound, Elliot Bay, Hood Canal, Commencement Bay, the Narrows west of Tacoma, Carr Inlet, Case Inlet, and navigable waters adjacent to these areas.

**§ 161.183 Separation zones.**

(a) Each separation zone is 500 yards wide and centered on a line that extends from one point to another, or through several points, described in paragraph (c) of this section.

(b) Two boundaries of each separation zone are parallel to its centerline and extend to and intersect with the boundary of a precautionary area. No part of any separation zone is contained in a precautionary area.

(c) The latitude and longitude describing the center line of the separation zone are:

- (1) Between precautionary area "S" and "SA",
  - (i) 48°12'22" N. 123°06'30" W.
  - (ii) 48°11'35" N. 122°51'55" W.
- (2) Between precautionary area "R" and "RA",
  - (i) 48°16'26" N. 123°06'30" W.
  - (ii) 48°19'06" N. 123°00'09" W.
- (3) Between precautionary area "RA" and "SA",
  - (i) 48°18'45" N. 122°57'30" W.
  - (ii) 48°12'40" N. 122°51'01" W.
- (4) Between precautionary area "RA" and "RB",
  - (i) 48°20'26" N. 122°57'01" W.
  - (ii) 48°24'14" N. 122°48'00" W.
  - (iii) 48°25'28" N. 122°46'23" W.
- (5) Between precautionary area "RB" and "SA",
  - (i) 48°25'12" N. 122°44'40" W.
  - (ii) 48°25'10" N. 122°44'12" W.
  - (iii) 48°12'52" N. 122°49'06" W.
- (6) Between precautionary area "SA" and "SC",
  - (i) 48°10'43" N. 122°47'50" W.
  - (ii) 48°07'43" N. 122°39'56" W.
  - (iii) 48°01'43" N. 122°38'02" W.

- (7) Between precautionary area "SC" and "SF",
  - (i) 48°00'36" N. 122°37'24" W.
  - (ii) 47°57'21" N. 122°34'12" W.
  - (iii) 47°55'24" N. 122°30'16" W.
  - (iv) 47°53'39" N. 122°28'21" W.
- (8) Between precautionary area "SF" and "SH",
  - (i) 47°52'34" N. 122°27'40" W.
  - (ii) 47°44'31" N. 122°25'41" W.
  - (iii) 47°40'18" N. 122°27'33" W.
- (9) Between precautionary area "SH" and "T",
  - (i) 47°39'05" N. 122°27'42" W.
  - (ii) 47°34'54" N. 122°26'54" W.
- (10) Between precautionary area "T" and "TC",
  - (i) 47°33'42" N. 122°26'33" W.
  - (ii) 47°26'53" N. 122°24'12" W.
  - (iii) 47°23'07" N. 122°21'08" W.
  - (iv) 47°19'54" N. 122°26'37" W.
- (11) Between precautionary area "CA" and "C",
  - (i) 48°44'15" N. 122°45'39" W.
  - (ii) 48°41'39" N. 122°43'34" W.

**§ 161.185 Traffic lanes.**

(a) Except as provided in paragraph (c) of this section, each traffic lane consists of the area within two parallel boundaries that are 1000 yards apart and that extend to and intersect with the boundary of a precautionary area. One of these parallel boundaries is parallel to and 250 yards from the centerline of a separation zone.

(b) No part of any traffic lane is contained in a precautionary area.

(c) The traffic lane in Rosario Strait consists of the area enclosed by a line beginning at latitude 48°26'50" N., longitude 122°44'27" W.; thence northerly to latitude 48°36'06" N., longitude 122°44'56" W.; thence northeasterly to latitude 48°39'18" N., longitude 122°42'42" W.; thence westerly and northwesterly along the boundary of precautionary area "C" to latitude 48°39'37" N., longitude 122°43'58" W.; thence southerly to latitude 48°38'24" N., longitude 122°44'08" W.; thence southwesterly to latitude 48°36'08" N., longitude 122°45'44" W.;

thence southerly to latitude 48°29'30" N., longitude 122°44'41" W.; thence southwesterly to latitude 48°27'37" N., longitude 122°41"; thence northeasterly and southeasterly along the boundary of precautionary area "RB" to the point of beginning.

**§ 161.187 Precautionary areas.**

The precautionary areas consist of:

(a) *Port Angeles precautionary area*. An area enclosed by a line beginning on the shoreline at New Dungeness Spit at latitude 48°11'00" N., longitude 123°06'30" W.; thence due north to latitude 48°17'10" N., longitude 123°06'30"; thence southwesterly to latitude 48°10'00" N., longitude 123°27'38" W.; thence due south to the shorelines; thence along the shoreline to the point of beginning;

(b) *Precautionary area "RA"*. A circular area of 2,500 yards radius centered at latitude 48°19'46" N., longitude 122°58'34" W.;

(c) *Precautionary area "RH"*. A circular area of 2,500 yards radius centered at latitude 48°26'24" N., longitude 122°45'12" W.;

(d) *Precautionary area "C"*. A circular area of 2,500 yards radius centered at latitude 48°40'34" N., longitude 122°42'44" W.;

(e) *Precautionary area "CA"*. A circular area of 2,500 yards radius centered at latitude 48°45'19" N., longitude 122°46'26" W.;

(f) *Precautionary area "SA"*. A circular area of 3,000 yards radius centered at latitude 48°11'28" N., longitude 122°49'43" W.;

(g) *Precautionary area "SC"*. A circular area of 1,250 yards radius centered at latitude 48°01'06" N., longitude 122°37'54" W.;

(h) *Precautionary area "SF"*. A circular area of 1,250 yards radius centered at latitude 47°53'10" N., longitude 122°27'48" W.;

(i) *Precautionary area "SH"*. A circular area of 1,250 yards radius centered at latitude 47°39'42" N., longitude 122°27'48" W.;

(j) *Precautionary area "T"*. A circular area of 1,250 yards

radius centered at latitude 47°34'19" N., longitude 122°26'47" W.;

(k) *Precautionary area "TC"*. A circular area of 1,250 yards radius centered at latitude 47°19'30" N., longitude 122°27'19" W.

**§ 161.188 Temporary precautionary areas.**

The Commander, Thirteenth Coast Guard District, may amend the description of the TSS in §§ 161.180—161.189 of this subpart to establish temporary precautionary areas to provide for seasonal activities such as fishing that affect the safe passage of vessels in the TSS.

**§ 161.189 Reporting points.**

The reporting points are—

- (a) Buoy "R" at latitude 48°16'26" N., longitude 123°06'30" W.
- (b) Buoy "S" at latitude 48°12'22" N., longitude 123°06'30" W.
- (c) Buoy "SA" at latitude 48°11'28" N., longitude 122°49'43" W.
- (d) Buoy "RB" at latitude 48°26'24" N., longitude 122°45'12" W.
- (e) Buoy "C" at latitude 48°40'34" N., longitude 122°42'44" W.
- (f) Buoy "SC" at latitude 48°01'06" N., longitude 122°37'54" W.
- (g) Buoy "SH" at latitude 47°39'42" N., longitude 122°27'48" W.
- (h) Buoy "TB" at latitude 47°23'07" N., longitude 122°21'08" W.
- (i) The boundary of the TSS.

**SUPPLEMENTAL REPORTING POINTS**

The following Supplemental Reporting Points may be used in reports to the VTC to advise the progress of vessels through the VTS Area when they are not in the vicinity of the Traffic Lanes.

1. Abeam Carter Point, Lummi Island
2. Abeam East end of Speiden Island, San Juan Islands
3. Abeam Obstruction Island, San Juan Islands
4. Thatcher Pass
5. Abeam Cattle Point, San Juan Island
6. Abeam Shannon Point, Fidalgo Island
7. Deception Pass
8. Protection Island
9. Elliott Point
10. Abeam Possession Point, Whidbey Island
11. Hazel Point, Hood Canal
12. Agate Pass
13. Point Vashon, Vashon Island
14. Point Defiance
15. Lyle Point, Anderson Island
16. Brisco Point, Hartstene Island

**APPENDIX A****SUMMARY**

A. Channel 13 (156.65 MHz) is the radiotelephone frequency designated for the Puget Sound Vessel Traffic System.

The voice-call for the Puget Sound Vessel Traffic Center is: SEATTLE TRAFFIC. All times will be given in Pacific Standard Time (Zone+8) or Pacific Daylight Time (Zone+7) whichever is in effect. The 24 hour clock time system will be used. All messages originated and received by the Vessel Traffic Center (VTC) shall be in the English language.

**B. INITIAL REPORT**

The following information is reported to SEATTLE TRAFFIC upon transmitting the initial report at least 30 minutes before entering the VTS Area:

1. Name of vessel.
2. Position of vessel.
3. ETA and position of entry in the VTS Area.
4. Final destination and ETA.
5. Any condition on vessel that may affect its navigation.
6. Any dangerous cargo aboard.

**C. FOLLOW-UP REPORT**

The following information is reported to SEATTLE TRAFFIC upon transmitting the follow-up reports at least 15 minutes, but not more than 45 minutes, prior to entry into the VTS Area:

1. Name, type, length and draft of vessel.
2. Any changes to information transmitted in initial report.
3. Speed (over the ground).
4. Tug with tow maneuvering difficulties.
5. ETA and point of entry into TSS.

**D. MOVEMENT REPORTS**

The following information is reported whenever a vessel passes a reporting point:

1. Name of vessel.
2. Reporting point.
3. Time of passing reporting point.
4. Next reporting point.
5. ETA next reporting point.
6. Change in speed of vessel.
7. If departing the TSS: course and destination or intentions.

The reporting points are:

1. When North of New Dungeness Light ..... (Buoy R)
2. When Northeast of Colville Point ..... (Buoy RB)
3. When Northeast of Lawrence Point ..... (Buoy C)
4. When abeam of New Dungeness Light..... (Buoy S)
5. When Southwest of Point Partridge Light . (Buoy SA)
6. When West of Double Bluff Light ..... (Buoy SC)
7. When West of West Point Light ..... (Buoy SH)
8. When abeam of Robinson Point ..... (Buoy TB)
9. When at the limits of the TSS.

NOTE: If the ETA at a reporting point changes by more than 10 minutes, a revised ETA is reported.

At any time during a voyage, report additional information which could be helpful to SEATTLE TRAFFIC. This includes adverse visibility, adverse weather conditions, heavy vessel traffic and concentrations of fishing vessels.

**E. FINAL REPORT**

The following information is reported whenever a vessel anchors or moors in, or departs from the VTS Area:

1. Name of vessel.
2. Position.
3. Estimated time of next movement.

F. Special reports are required for ferry vessels and vessels about to enter Rosario Strait. These reports are contained in the Communication Rules (Ferry Vessels) and the Rosario Strait Rules sections of the operating manual.

## APPENDIX B

### PHONETIC ALPHABET

ALPHA	JULIETT	SIERRA
BRAVO	KILO	TANGO
CHARLIE	LIMA	UNIFORM
DELTA	MIKE	VICTOR
ECHO	NOVEMBER	WHISKEY
FOXTROT	OSCAR	X-RAY
GOLF	PAPA	YANKEE
HOTEL	QUEBEC	ZULU
INDIA	ROMEO	

### FIGURES

In the United States, the figures one, two, three, etc. are used to the exclusion of anything else. Other systems do exist and are listed here should they be encountered in communications with foreign vessels.

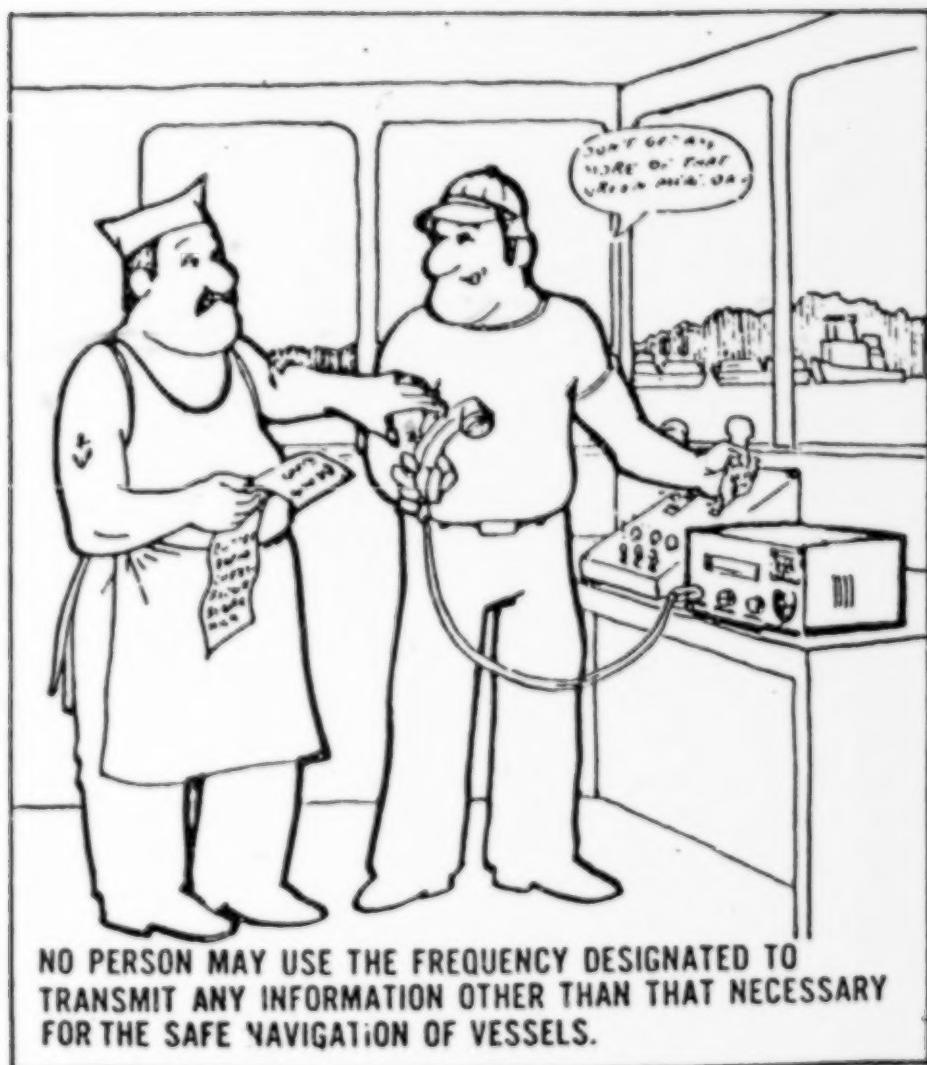
<i>Figure</i>	<i>English</i>	<i>International</i>
0	Zero	Nadazero
1	One	Unaone
2	Two	Bisstwo
3	Three	Terrathree
4	Four	Kartefour
5	Five	Pantafive
6	Six	Soxisix
7	Seven	Setteseven
8	Eight	Oktoeight
9	Nine	Novenine
.	Point	Decimal

## APPENDIX C

### SAMPLE MESSAGES

#### A. GENERAL

"Radio equipped vessels" are required to maintain a listening watch on the VTS working frequency, Channel 13. This is also the Bridge-to-Bridge Radiotelephone Frequency. Turning the radio set down or off defeats the very heart of the system—that being every vessel will know who/what the other vessel in his vicinity is doing. (1) Listen to the receiver before transmitting so another vessel's communication is not "broken up". (2) Use the name of the vessel being called FIRST, then your own vessel's name; DO NOT USE INTERNATIONAL CALL SIGNS. (3) Use Channel 13 only for navigational safety purposes.

**B. INITIAL REPORT**

A vessel is approaching Alden Bank bound for Seattle and is 30 minutes from entering the VTS Area.

Call up: SEATTLE TRAFFIC, THIS IS THE CATHERINE ELIZABETH, OVER.

Reply: CATHERINE ELIZABETH, THIS IS SEATTLE TRAFFIC, OVER.

**Message:** SEATTLE TRAFFIC, CATHERINE ELIZABETH, PASSED POINT ROBERTS, ENTERING VTS AREA AT 2015 ABEAM ALDEN BANK, DESTINATION SEATTLE ETA 0800, TOWING TWO GRAVEL SCOWS, OVER.

**Reply:** CATHERINE ELIZABETH, SEATTLE TRAFFIC, ROGER, (any traffic advisory, OVER), OUT.

**C. INITIAL AND FOLLOW-UP REPORTS**

- At 1400, a vessel is about to depart the Port Angeles' pilot station bound for Seattle.

Call up: SEATTLE TRAFFIC, THIS IS THE BONNY LAD, OVER.

Reply: BONNY LAD, THIS IS SEATTLE TRAFFIC, OVER.

**Message:** SEATTLE TRAFFIC, BONNY LAD, FREIGHTER, 605 FT., DRAFT 32 FT., DEPARTING EDIZ HOOK 1420 ENTERING VTS AREA. DESTINATION SEATTLE ETA 1845, RADAR INOPERATIVE, NO DANGEROUS CARGO. SPEED 16 KNOTS, ETA REPORTING POINT "SIERRA ALPHA" 1500, OVER.

Reply: BONNY LAD, SEATTLE TRAFFIC, ROGER (any traffic advisory, OVER), OUT.

- For a voyage totally within that portion of the VTS Area not served by the TSS.

Example: A vessel at Point Wells is departing en route La Conner.

Call up: SEATTLE TRAFFIC, THIS IS THE BARBARA ANN, OVER.

Reply: BARBARA ANN, THIS IS SEATTLE TRAFFIC, OVER.

Message: SEATTLE TRAFFIC, BARBARA ANN, DEPARTING POINT WELLS 1615 EN ROUTE LA CONNER. SPEED 8 KNOTS. ETA LA CONNER 2015, TOWING GAS BARGE, RADAR INOPERATIVE, OVER.

Reply: BARBARA ANN, SEATTLE TRAFFIC, ROGER, (any traffic advisory, OVER), OUT.

D. VESSEL MOVEMENT REPORT. For reporting the position of the vessel and its progress through the VTS Area while transiting the TSS. A vessel is transiting the TSS southbound for Seattle and is passing buoy "SC."

Call up: SEATTLE TRAFFIC, THIS IS THE SANDRA CORRY, OVER.

Reply: SANDRA CORRY, THIS IS SEATTLE TRAFFIC, OVER.

Message: SEATTLE TRAFFIC, SANDRA CORRY, PASSING "SIERRA CHARLIE", ETA "SIERRA HOTEL" 1643, NEW SPEED 10 KNOTS, OVER.

Reply: SANDRA CORRY, SEATTLE TRAFFIC, ROGER (any traffic advisory, OVER), OUT.

E. FINAL REPORT. For the termination of any voyage within or departing the VTS Area.

Example (1): A vessel is arriving Pier 36, Elliott Bay.

Call up: SEATTLE TRAFFIC, THIS IS THE PATRICIA ANN, OVER.

Reply: PATRICIA ANN, THIS IS SEATTLE TRAFFIC, OVER.

Message: SEATTLE TRAFFIC, ARRIVED PIER 36, 2016, OVER.

Reply: THIS IS SEATTLE TRAFFIC, ROGER, OUT.

Example (2): A vessel is passing Patos Island and is departing the VTS Area en route Vancouver, B. C.

Call Up: SEATTLE TRAFFIC, THIS IS THE JACKSON HEIGHTS, OVER.

Reply: JACKSON HEIGHTS, THIS IS SEATTLE TRAFFIC, OVER.

Message: SEATTLE TRAFFIC, JACKSON HEIGHTS PASSING PATOS ISLAND, DEPARTING VTS AREA EN ROUTE VANCOUVER, B. C., OVER.

Reply: JACKSON HEIGHTS, SEATTLE TRAFFIC, ROGER, OUT.

F. ROSARIO STRAIT REPORT. For a voyage through Rosario Strait, report is made at least 15 minutes prior to entry into Rosario Strait.

Call up: SEATTLE TRAFFIC, THIS IS THE ARCTIC MARU, OVER.

Reply: ARCTIC MARU, THIS IS SEATTLE TRAFFIC, OVER.

Message: SEATTLE TRAFFIC, ARCTIC MARU, TUG AND TOW, 300 FEET, DRAFT 9 FEET, DEPARTING ANACORTES 1400, SPEED 10 KNOTS, ETA BUOY 8 ROSARIO STRAIT 1430, EN ROUTE BLAKELY ISLAND ETA 1515, NO DANGEROUS CARGO, OVER.

Reply: ARCTIC MARU, SEATTLE TRAFFIC, ROGER, 1 MILE VISIBILITY IS REPORTED IN ROSARIO STRAIT, THE TANKER LINDA SUSAN IS NORTHBOUND WITH ETA BUOY 8 AT 1430, DO NOT ARRIVE AT BUOY 8 PRIOR TO 1440, REPORT WHEN ABEAM SHANNON POINT, OVER.

Reply: SEATTLE TRAFFIC, ARCTIC MARU, ROGER, MY  
REVISED ETA BUOY 8 IS 1445, OVER.

Reply: ARCTIC MARU, SEATTLE TRAFFIC, ROGER,  
OUT.

**EXHIBIT Y**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

THREE JUDGE COURT  
(Parts of letterhead omitted in printing.)

STATE OF WASHINGTON  
Office Of The Governor  
OLYMPIA

January 21, 1976

The Honorable Gerald R. Ford  
President of the United States  
The White House  
Washington, D.C.

Dear Mr. President:

I would like to discuss with you a problem of ever-growing concern to those of us along the Pacific Coast and Alaska. Our concern is the increasingly large numbers of petroleum tankers which are calling at ports in our states, tankers which in many cases do not reflect the latest developments in the art of tank-ship building, and which as a result present potential threats to our environment which can no longer be ignored.

With the cut off of Canadian crude oil delivery to our State, we are assured of steadily increasing tanker movements and substantial increases in volumes of crude oil moved by water, in order to keep our refineries in operation. The opening of Alaskan crude deliveries is an integral part of this problem. We can certainly accept the necessity for such movements but we also feel that everything possible should be done to insure safe passage on and through our state's inland waters in order to reduce to the absolute minimum the environmental impact of such traffic.

Maritime and Coast Guard construction standards for tank ships currently do not reflect, in all cases, the advancements which have been made in ship building. For example the Maritime Administration requires inert gas systems (primarily a ship-safety device) only on tankers of 100,000 dead weight tons (dwt.) or greater. The Coast Guard does not require double bottoms in any such vessel in spite of the fact that, by their own statistics, 27

out of 30 groundings in the last 10 years would have resulted in zero oil spillage if the vessels involved were equipped with double bottoms. Tanker builders are willing and capable of installing such safety devices but, lacking any government regulation requiring such actions, will do so only at the request of the owner.

In the State of Washington we have attempted to exercise a certain element of control over present and projected tanker movements through our tug escort bill (requiring tugs to accompany all vessels larger than 60,000 dwt. through restricted waters and banning crude tankers larger than 125,000 dwt. entirely). This concept is now being tested in federal court and the outcome is unsure, but in the meantime I would urge that all the other available options be exercised to insure minimum impact from these vessel movements.

Specifically, I urge you to direct the Coast Guard and the Maritime Administration to exercise their regulatory powers and require that all tankers be built with double bottoms, inert gas systems, segregated ballast systems, collision avoidance radar, Loran C systems and any other safety system presently available to the industry. Any vessel designed for trade where tug assistance is unavailable should also be equipped with bow thrusters. These items are thoroughly discussed in a Congressional report of July, 1975 entitled, "Oil Transportation by Tankers" prepared by the Office of Technology Assessment.

These proposals are not new; they simply require the incorporation of existing technology now, rather than permitting the agencies responsible for these procedures to continue delaying the eventual acceptance of these concepts. Costs involved in these changes are minimal, and when compared to the cost of cleaning up a major spill, are insignificant indeed. I urge prompt action in this regard.

Sincerely,  
 (Signed): Daniel J. Evans  
 Governor

DJE:dg  
 cc: Senator Jackson  
 Senator Magnuson  
 William T. Coleman  
 Secretary of Transportation  
 Mr. Elliot Richardson  
 Secretary of Commerce, Designee

Testimony of  
 The Honorable Daniel J. Evans  
 Governor of the State of Washington  
 to the

Committee on Commerce  
 United States Senate  
 on the  
 Ports and Waterways Safety Act of 1972  
 March 2, 1976

Mr. Chairman, Members of the Committee:

Since the signing of the Ports and Waterways Safety Act in 1972, we in Washington and the citizens of our sister States of the Pacific Coast have seen a steady erosion of its purposes, coupled with a compounding of the underlying problems it was intended to address, both occurring largely through the actions of Federal agencies. About the only good news since then is the fact that this Committee is exercising its powers of oversight, with the intent of correcting deficiencies in implementation of certain mandates established by the Act.

The Act itself is a good one. A Federal agency, the Coast Guard, in Title II is directed to develop high standards of tank vessel design, operation and reduction of oil loss in the case of accident, all of which you in Congress and we in the affected areas considered minimal steps in preparing for the huge volumes of Alaskan oil destined for West Coast ports. The Coast Guard said

all the right things, including the announcement shortly afterward (38FR2467) that it was "considering" the segregated ballast-double bottom requirement for the new Jones Act vessels in the Alaskan trade. You will recall that with the Ports and Waterways Safety Act in place, and Coast Guard seemingly prepared to implement its purposes, there was a considerable relaxation of concerns in the coastal states.

I will only briefly summarize adverse events since then affecting our own State of Washington, but I ask that you bear in mind that many of these points also apply to the other states directly involved in the oil shipments, Alaska and California, as well as to Oregon and the Canadian Province of British Columbia, whose long coastlines are just as exposed, and just as vulnerable as our own coastal and inland waterways.

After the 1973 embargo, Canada announced an end to crude exports in the mid-1980's, later moving the date up to 1980. This impacts Washington more than any other state, since all four of the major refineries historically receive the great bulk of their crude via pipeline from Canada.

Then early this year, PEA announced *and implemented* regulations for allocation of the dwindling Canadian supply to other states. Our projected cutoff now comes early next year, in 1977.

In Washington, as elsewhere in the world, we see the effect of a global surplus of tankers, most operating under foreign flags of convenience. Costs must be cut and operating standards reduced in order to secure any charter, and the vessels themselves, many designed and built speculatively, are aging quickly.

At the same time, the average size of vessels is increasing, but with comparable decreases in maneuverability and stopping capability. And even the Jones Act vessels destined for the Alaskan trade, while probably better than the world average, are in fact mostly larger replicas of old, minimum-cost designs. Many are newer, but not safer, larger and more risky in the event of any deviation from nominal transit conditions in our restricted Puget Sound waters.

Finally, and this goes to the heart of the matter, the Coast Guard has steadily retreated from its 1973 position, and has

now turned into an advocate for "economic" considerations. I am unaware that Congress had ever given them this advocacy role, and in this specific case, I ask that Congress carefully examine all their pertinent statements and actions since 1972. If it appears that Coast Guard has used those years to "buy time" for the industry it should be regulating, for example, in getting minimum-cost vessels "grandfathered" into the Alaskan oil trade, then I believe corrective action would be in order.

To some extent, the damage is done. The protection we were assured of in the 1972 act does not exist: the Alaska fleet is mostly operating, or in construction, to far lower standards of safety than I believe Congress envisioned in 1972. While Congress can, and I hope *will* correct the situation for the future, we and our sister states will have to bear the exposure and the damages which are sure to come.

I should point out that we are not opposing the use of very large *new* tankers *under certain conditions*, nor do we ask that the *present* Alaska fleet be scrapped. If the clear intent of the 1972 Act had been followed, the present fleet would be a better one, but we can prepare to live with the outcome. That is what I want to talk about now, preparing for the future.

First, obviously, Congress must ensure that the intent of the 1972 Act will be carried out *henceforth*, and that any existing obstacles to its implementation be removed, either administratively or via additional legislation.

Second, Congress should keep after the difficult, but increasingly critical problem of standards for *non-Alaskan* tankers discharging cargoes in U.S. waters. International agreements are not presently adequate because all the present incentives work the other way, and we must move unilaterally to protect our own waters and shores. The world tanker fleet is aging and deteriorating, and its owners and operators have no impetus to upgrade to the standards Congress has set out to apply to our own vessels.

Further, Congress should aid the coastal states directly, and massively in some cases, to prepare for increases and shifts in the oil and LNG trade of the country as a whole. In Washington, we can handle the regional share of the Alaskan and other oil trade with reasonable safety and reasonable economy, if we consolidate the terminal operations at a single point outside the more restricted and sensitive areas. If necessary, from the standpoint of national interest, we could also probably accommodate a pipeline terminal for the benefit of inland refiners in the Northern Tier states, and the resultant economies of scale would make the consolidated terminal development increasingly more feasible.

Therefore I propose to this Committee that the time has come, indeed is long past, to begin dealing with all the issues of oil and LNG traffic in U.S. waters as a *single system* in urgent need of system-wide planning and development. It begins today with this review of tanker design and operations, for both U.S. and foreign vessels, but continues directly through the issues of new ports and pipelines, spill cleanup and liability, and the relative status of the states and federal agencies in a working partnership.

We in the states cannot do it alone, and indeed it is this relatively powerless and fragmented situation which has led to creation of the uncoordinated, dangerous situation we now face. Thus as the long-awaited national energy policies begin to emerge, we turn to you for effective relief through recognition of the serious *system* deficiencies which still exist.

This leads me to a final observation concerning federal-state relationships. Over the past decade, Congress and the national Administrations have, as a matter of national policy, encouraged the states to lead in protecting our waters against degradation. I refer specifically to the Federal Water Pollution Control Acts, particularly those of 1965 and 1972, the Coastal Zone Management Act of 1972, and the Deep Water Ports Act of 1974 as examples. The State of Washington has accepted the challenges of federal policy and legislation and has enacted numerous environmental protection statutes designed to protect our waters from pollution by oil and other pollutants.

I have always viewed the Ports and Waterways Safety Act of 1972 as a solid piece of environmental protection legislation which allows the best efforts of the federal government and the states to operate in the subject area of the act. Unfortunately, and I believe contrary to the intent of Congress, the Act is being relied upon to undermine a 1975 state statute (Chapter 125, Laws of 1975, first Extraordinary Session) on the basis of "federal preemption".

This state statute prohibits very large oil tankers (over 125,000 dwt) from entering the most vulnerable part of our inland waters and requires tankers from 40,000 to 125,000 dwt to be equipped with certain safety equipment or to have a tug escort while in these local waters. This statute is sound legislation which takes a reasonable approach to achieve a needed objective. The act operates in a field which has historically been viewed as a proper area for state activity. The statute was supported by a wide range of interest groups and individuals.

I urge the Committee to examine the Ports and Waterways Safety Act of 1972 carefully as it pertains to federal-state relations. In so doing I recommend to the Committee that it reaffirm federal policy of recent times that the Act does not preempt the states in the field of water protection. The Committee should further confirm that the Act allows for the states, working in harmony with the federal government, to develop and operate natural resources protecting passages to the inland marine waters of our country.

## FINAL ENVIRONMENTAL STATEMENT

(Regulations For Tank Vessels Engaged In The Carriage of Oil  
In Domestic Trade. Protection of The Marine Environment —  
Department of Transportation, Coast Guard)  
(pp. i-vii, 1-86, 209-220)

### SUMMARY

Department of Transportation	Executive Secretary
U. S. Coast Guard	Marine Safety Council
Contact Individual	U. S. Coast Guard (G-CMC/82) Washington, D. C. 20590 (202) 426-1477

#### 1. Name of Action.

(x) Administrative Action ( Legislative Action

#### 2. Description of Action.

The pollution regulations in Subchapter O of Title 33, Code of Federal Regulations, are to be amended by adding regulations governing the design and operation of certain seagoing U.S. tankships and barges certificated to carry oil in the United States domestic trade. These regulations represent one step by the Coast Guard to implement the Ports and Waterways Safety Act of 1972 (P. L. 92-340), Title II, as amended. They are based on standards adopted by the International Conference for the Prevention of Pollution from Ships, 1973, but also include constraints on the location of segregated ballast spaces required on new tankers over 70,000 deadweight tons (DWT).

#### 3. Environmental Impact and Adverse Environmental Effects.

The discharge criteria (along with the construction features, equipment, and operating practices necessary to meet the discharge criteria) specified in these regulations will result in a substantial reduction in the amount of oil introduced to the sea from U.S. seagoing tank vessels in domestic trade. The estimated

annual oil input to the ocean from U.S. tankers in domestic trade (currently about 100,000 metric tons) will be reduced by about 80 percent as a result of these requirements with additional reductions resulting in future years as new vessels built with improved damage resistance and defensive space arrangement enter service. A much greater reduction will result from adoption of similar control measures by other countries with the adoption and entry into force of the 1973 Marine Pollution Convention. The Coast Guard hopes that extension of these standards during 1976 to U.S. vessels in foreign trade and foreign vessels entering U.S. waters will contribute toward adoption of the Convention by other countries.

It is impossible to say what impact the elimination of the oil pollution that would otherwise occur will have on the marine environment. Too little is known about the ocean system and its ability to accommodate petroleum hydrocarbon inputs. Until basic questions concerning the level of petroleum hydrocarbon input at which irreversible damage will occur can be answered it seems wisest to work for international control of inputs and push forward research to reduce our current level of uncertainty. These regulations are consistent with that goal.

These regulations should have no adverse environmental effects.

#### 4. Economic Impact

These regulations require a number of actions to be taken by shipowners in an effort to reduce oil inputs to the oceans. These actions will require additional capital investment in vessels and equipment and will also increase operating costs. It is likely that these additional costs of doing business will be passed on to the consumer as increased transportation costs added onto the price of petroleum products. Under the most pessimistic set of assumptions, these increased transportation costs are estimated to be less than 0.2 cents per gallon. The Coast Guard has considered these costs, along with the need for regulations and the extent to which the rules being considered will contribute to safety and protection of the marine environment, and has concluded that the expenditures involved are warranted by the results expected.

#### 5. Alternatives Considered

- a. Publish no additional regulations. (No Action)
- b. Publish regulation less stringent than those proposed.
- c. Publish regulations more stringent than those proposed, including double bottoms, additional segregated ballast requirements, and equipment intended to improve maneuvering and stopping ability.
- d. Reduction of oil consumption or reduction of oil imports.
- e. Use of a different mode of transportation for oil.

#### 6. Comments on the draft statement were requested from the following (\* indicates comments were received and are attached):

- Department of the Interior
- \*Environmental Protection Agency
- \*Department of Defense
- \*Department of Commerce
- \*Department of Transportation
- Department of State
- Sierra Club
- Connecticut Citizens Action Group
- \*Center for Law and Social Policy (representing a number of groups)
- \*American Petroleum Institute
- \*American Institute of Merchant Shipping
- American Association of Port Authorities
- American Maritime Association
- American Waterways Operators, Inc.
- Shipbuilders Council of America
- Environmental Policy Center
- Coalition Against Oil Pollution
- \*National Audubon Society

In addition, comments were received from the State of New Jersey, Department of Environmental Protection.

7. Dates statements were made available to the Council on Environmental Quality and the public:

Draft statement	28 June 1974
Final statement	15 Aug. 1975

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(Page numbers omitted in printing.)

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#### **REFERENCES**

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ed as an aid in understanding this EIS. Final rules will incorporate changes as noted on page 228.)

**APPENDIX B: CONCLUSIONS OF NATIONAL ACADEMY OF SCIENCES STUDY,  
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**APPENDIX C: REPORT OF STUDY GROUP ON LOCATION OF SEGREGATED BALLAST**

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**APPENDIX F: CALCULATIONS FOR TABLE 6—COMPARISON OF OIL INPUTS FROM U.S. TANKSHIPS**

(For index of Figures and Tables, see pp. 332-333 herein.)

**1. INTRODUCTION**

This statement is the U.S. Coast Guard's final Environmental Impact Statement (EIS) issued in compliance with the requirements of the National Environmental Policy Act (NEPA) of 1969, section 102(2)(C) and the Guidelines of the Council on Environmental Quality (CEQ) implementing that Act, on a regulatory proposal for additional pollution regulations, Sub-chapter 0 of Title 33, directed at seagoing U.S. tank vessels engaging in domestic trade.

This statement has been extensively revised in format and has had additional information incorporated in response to comments received on the draft EIS made available to CEQ and the public on June 28, 1974. It also reflects comments made on

the regulatory proposal itself, even though such comments were not directed at the contents of the draft statement. The reorganization and additions to the draft EIS were desirable to enhance readability and understanding of the proposed action. The draft EIS was not intended to be a complete "technology assessment" of the transport of oil at sea, but rather to be specifically responsive to the action as proposed and alternatives to that action. The proposed regulations are not a complete and comprehensive answer to all the complex problems arising from the transport of oil by ship. They are one step in a continuing process.

The statement has been expanded to include information which will permit the reader to more fully appreciate the scope and complexity of the tank vessel pollution problem. It also touches upon the present and projected studies necessary to support additional regulatory proposals concerned with aspects of the problem which have been identified but which are not considered within the scope of this action.

**2. DESCRIPTION AND PURPOSE OF THE ACTION**

**2.1 Purpose**

The purpose of this regulatory action is to effect a significant reduction in operational pollution from all seagoing U.S. tank vessels engaged in domestic trade, and to provide added protection against outflow in the case of accidents to new tank vessels in this trade. This will be accomplished by imposing additional requirements governing the design, construction, alteration, repair, and operation of these vessels, including the retrofitting of certain equipment and construction features to existing vessels. These regulations represent one step in the implementation of Title II of the Ports and Waterways Safety Act of 1972. Additional steps to be taken are outlined in Section 4.6 on page 82.

**2.2 Background**

Section 201 of the Ports and Waterways Safety Act of 1972 (P.L. 92-340, 86 Stat. 427) amended Section 4417a of the Revised

Statutes of the United States (46 U.S.C. 391a) to address requirements for rules and regulations for the protection of the marine environment in addition to personnel and vessel safety.

As an initial step in implementing the Ports and Waterways Safety Act, the Coast Guard published in the January 26, 1973, issue of the Federal Register (38 FR 2467), an advance notice of proposed rulemaking that invited comments from the public concerning standards for pollution abatement for new tankships constructed for trade on the navigable waters of the United States. The construction requirements concerned segregated ballast tanks, achieved in part by fitting in the cargo length a double bottom.

The advance notice was published with two purposes in mind:

1. Implementation of Section 201 of the Ports and Waterways Safety Act of 1972 (P.L. 92-340, 86 Stat. 427, 46 U.S.C. 391a(7)) to comply with the effective date mandated by Congress. This was especially important in view of the long lead time the marine industry needs for orderly planning and design engineering; and
2. Solicitation of comments from all sectors of the public. Sixty-seven written comments were received on the proposal and an evaluation of the comments was made. The comments involved much more than simple expressions of support or nonsupport. Three common areas of concern appeared with a fair degree of commonality in the comments. These were:
  - a. The high initial cost associated with double bottoms.
  - b. The need for international agreement and the danger of unilateral action.

- c. The treatment to be accorded existing foreign and domestic shipping not covered by the proposal.

In the July 5, 1973, issue of the Federal Register (38 FR 17848), the Coast Guard published a supplement to the advance notice of proposed rulemaking. This supplement explained that 46 U.S.C. 391a(7)(C), as amended, allows for the establishment of rules and regulations consonant with international treaties, conventions, or agreements. Since the International Conference on Marine Pollution was scheduled for October 1973 and since the results of the conference would have a direct bearing on implementing regulations under Section 391a(7), the Coast Guard notified the public that action under the advance notice would be withheld until after the Conference.

Pollution of the seas by oil as a result of vessel operations has been recognized as a **world** problem for some years, and pollution prevention measures have been the subject of several international agreements (for example, the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, along with 1962 and 1969 amendments to that agreement). The main purpose of the international conference held in London, England, during October 1973, at which some 79 countries were represented, was for nations to agree on further measures to reduce oil pollution from tank vessels. Considerable work went into preparation for the Conference, and, on the basis of studies done in this country, the U.S. position prior to the Conference included a provision that segregated ballast, carried in part in double bottoms, should be required on vessels larger than 20,000 DWT. In spite of the U.S. delegation's efforts, this position received only token support at the Conference. The resulting International Convention for the Prevention of Pollution from Ships, 1973, (referred to in this statement as "the 1973 Marine Pollution Convention" or "the Convention") requires segregated ballast for ships over 70,000 DWT but no double bottoms. While this was considerably less than the U.S. had hoped to achieve, it is a great improvement over the requirements currently in effect for tankers. The 1973 Convention far surpasses, in both breadth of coverage and in methods of control, previous international agreements. For example, the discharge of light refined oil

products will be controlled for the first time as will a number of other previously unregulated major sources of marine pollution. The carriage of noxious liquid substances will be regulated and requirements on discharges will be imposed ranging from retention on board for disposal at shoreside reception facilities to dilution of the residue prior to discharge. In a number of respects the 1973 Marine Pollution Convention represents a significant step forward in international efforts to control marine pollution.

About the same time the Conference was ending in London, on November 16, 1973, there was a change in dates by which regulations were to be effective. Rules published pursuant to 46 U.S.C. 391a(7)(C) were now to be effective by June 30, 1974, for U.S. flag vessels engaged in coastwise trade, as a result of Section 401 of the Act of November 16, 1973 (P. L. 93-153, 87 Stat. 589).

After the Conference, the Coast Guard was faced with making a number of significant policy decisions before drafting proposed regulations. Answers to the following questions were sought:

Should the U.S. accept the standards agreed upon internationally or take unilateral action to impose higher standards on U.S. ships and foreign ships entering U.S. waters?

If we accept the Convention results for foreign ships and U.S. ships in foreign trade, need there be different standards applied to U.S. ships in domestic trade?

The following policy alternatives were available:

1. Adopt the Convention standards for all U.S. vessels and all foreign vessels entering U.S. waters.
2. Require higher standards for U.S. vessels in domestic trade.
3. Require higher standards for all U.S. vessels.

4. Require higher standards for all U.S. vessels and all other vessels entering U.S. ports.

Factors considered in selecting one of these policy alternatives included not only environmental considerations but also social, legal, economic, political, and safety factors.

Faced with a revised deadline of June 30, 1974, to have regulations for U.S. vessels engaged in coastwise trade effective, the Coast Guard considered the situation and the information available and concluded:

The 1973 Marine Pollution Convention, while not containing everything the United States would have liked, did offer potential for significant reduction in oil inputs to the world's oceans.

This reduction was a needed step and in the Coast Guard's judgment, provided an adequate level of abatement of operational pollution, at least for the immediate future, and

Regulations issued by the Coast Guard for domestic tankers should be consistent with the Convention with the view toward fully implementing the Convention for all U.S. tankers and foreign tankers entering our ports by the 1976 deadline specified in the Ports and Waterways Safety Act. (A policy, in effect, of implementing the Convention early, before it came into effect as international law.)<sup>1</sup>

So proposed regulations were developed and, after consultation with the Environmental Protection Agency, the Maritime Administration, and others, were published in the June 28, 1974, issue of the Federal Register.

Public hearings were held on July 23 and 24, 1974, in Seattle, Washington, and on July 30 and 31, 1974, in Washington, D. C. Ninety-eight written comments were also received, which were

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<sup>1</sup>Factors considered in reaching these conclusions and reasons behind them are discussed on pages 6-10.

added to the comments on the advance notice received earlier.

Since the deadline for receipt of public comments in August 1974, the Coast Guard has been involved in analysis of those comments and in various studies and discussions to try to accommodate objections to the proposed rules expressed by members of Congress, environmental groups, and government agencies. The study of segregated ballast location discussed on page 19 and in Appendix C, page 241 and the resulting modification to the rules to specify distribution of segregated ballast spaces is one such effort. During this period the grounds for the Coast Guard conclusions stated above have also been thoroughly reviewed. The draft environmental impact statement has been revised to reflect the comments, studies, discussions, and review of decisions made earlier before the proposed rules were published.

The Coast Guard remains convinced that U.S. participation and leadership in international pollution control efforts is absolutely essential and that the approach taken in the proposed rules published June 28, 1974, was correct, even if poorly explained in the draft environmental impact statement. The final rules are, therefore, essentially the same as the proposed rules, except that requirements for distribution of segregated ballast spaces have been added to make maximum effective use of such spaces to reduce oil outflow resulting from collisions and groundings.

In developing these regulations the Coast Guard has followed the procedure outlined in Title II of the Ports and Waterways Safety Act by considering:

1. The need for regulations.
2. The extent to which proposed regulations will contribute to safety or protection of the marine environment.
3. The practicability of compliance with the regulations including cost and technical feasibility.

The need for regulations, in terms of oil inputs to the marine

environment and their effects, are discussed in Section 3, starting on page 23. The contributions the regulations will make toward reduction of oil inputs and the practicability of compliance with the rules are also discussed in Section 3. In view of the information developed and presented in Section 3, the Coast Guard has concluded:

Current levels of oil input to the marine environment are not causing serious irreversible damage, but no one is really sure how much oil the oceans can accommodate—it may be many times the current inputs or within an order of magnitude of current levels (ten times larger).

Tank cleaning and ballasting of tankers are responsible for approximately 80 percent of the oil entering the oceans from tankers and about 18 percent of the estimated worldwide input of petroleum hydrocarbons. They thus constitute the most serious threat to the marine environment due to pollution from oil tankers.

Because of tanker ownership and trade patterns and the international nature of world shipping, *international* control of oil inputs from tank cleaning and ballasting of tankers is absolutely essential.

The 1973 Marine Pollution Convention, while not achieving all that the Coast Guard would have liked, particularly in the area of accidental protection, offers the potential for effectively controlling oil inputs from tanker operations and reducing them to acceptable levels.

The Convention deserves wholehearted U.S. support and should serve as the basis for regulations for U.S. tankers and foreign tankers entering U.S. waters issued under the Ports and Waterways Safety Act of 1972.

The Coast Guard feels there are a number of good reasons why the United States should accept the provisions of the 1973 Marine Pollution Convention as a sound basis for regulatory action.

One reason is because of its effectiveness in reducing oil entering the oceans. Implementation of the Convention provisions will significantly reduce operational discharges from vessels and will also affect accidental discharges to some extent (through application of tank size, subdivision, and stability requirements). Specific details of these requirements and their effects are discussed later in this Section and in Section 3. Due to the international nature of ocean shipping and the realities of world petroleum trade, the United States, working alone, cannot make a significant impact on operational pollution — it must be a cooperative international effort.

Congress has taken specific notice of the need for international cooperation in circumstances involving worldwide environmental problems. Section 102(2)(E) of the National Environmental Policy Act directs that:

"to the fullest extent possible: \* \* \* all agencies of the Federal Government shall — \* \* \* recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment; \* \* \*"

The wisdom of this provision pertains even where the results achieved from international cooperation are less than completely satisfactory. The important point is that where substantial improvement has been made through this cooperative process — as was achieved at the 1973 Marine Pollution Conference — the process should be supported.

There are also economic and political reasons for ratifying the Convention and implementing it in U.S. regulations. Complications arising out of unilateral action, including loss of foreign trade, retaliatory actions against U.S. shipping, and adverse effects on foreign relations, are all avoided by making our actions consistent with an already agreed-upon international course of action.

There are some additional reasons for Coast Guard optimism concerning effectiveness of the 1973 Marine Pollution Convention. The Convention contains two extremely important provisions whose significance is not widely appreciated. One of these provisions will make it much easier to bring this Convention into force than it has been to make previous international pollution prevention agreements international law. The second provision will make future amendment of the Convention's technical provisions and regulations much faster. To illustrate, the 1969 amendments to the 1954 Pollution Prevention Convention have not become international law due to the large number of nations whose ratifications are needed to bring them into force. The 1973 Convention, however, will be brought into force 12 months after ratification by only 15 nations who, between them, control 50 percent of the gross tonnage in the world's merchant fleet. This formula offers the possibility for rapid entry of the Convention into force compared to past agreements. In addition, the 1973 Convention can be amended through a tacit acceptance procedure initiated at regular meetings of permanent IMCO bodies. A special conference is not required as in the past. So it will be possible in the future to change the agreement more quickly, making it much more responsive to environmental and technological developments. Both of these features are significant steps forward in international efforts to control marine pollution.<sup>2</sup>

All of this may explain why the Coast Guard feels it is important for the United States to ratify the 1973 Marine Pollution Convention and even to use the Convention as the basis for regulations for U.S. tankers in foreign trade and foreign tankers entering U.S. waters. But why does the Coast Guard feel it is necessary to make regulations for seagoing U.S. tank vessels in domestic trade the same as the regulations for vessels engaged in foreign trade?

A number of comments critical of the Coast Guard's decision on this point were received on both the draft environmental

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<sup>2</sup>For additional background and discussion on the 1973 Marine Pollution Convention see references 1, 2, and 3.

impact statement and the proposed regulations. Basically, the commenters wanted high construction standards (double bottoms in particular) for U.S. tank vessels engaged in domestic trade and could not see why the Coast Guard had not imposed such standards.

The Coast Guard feels any distinctions or differences in the regulations it issues under the Administrative Procedure Act should be based on categories or distinctions established by law, or on some safety or environmental reason for distinguishing among members of a group. In the Coast Guard's opinion neither of these conditions exists at present with respect to the measures being considered, and there is therefore no legal basis for issuing rules for U.S. tank vessels engaged in domestic trade which are different from those to be made applicable to other U.S. tank vessels and to foreign vessels entering U.S. ports.

Prior to its amendment by the Ports and Waterways Safety Act of 1972 the Tank Vessel Act (46 U.S.C. 391a) required the Commandant of the Coast Guard to establish rules and regulations to secure effective provision against the hazards to life and property created by the operation of U.S. tank vessels. The resulting regulations made no distinction between tank vessels in domestic trade and those in foreign trade. There were, however, distinctions among various classes of tank vessels based on safety reasons. These distinctions in the requirements were based on factors related to the risks associated with operation of the vessel (*e.g.*, vessel size, exposure to rough weather, or dangerous characteristics of the cargo).

In July 1972, the Ports and Waterways Safety Act amended the Tank Vessel Act, directing that increased awareness be paid to environmental protection features of tank vessel design, construction, alteration, maintenance, and operation. The Ports and Waterways Safety Act did not establish that any distinction should be made among U.S. tank vessels on the basis of trade route. Section 201(7)(D) of the Act did state that rules must be equally applicable to U.S. vessels in foreign trade and foreign vessels trading into the United States.

If no distinction is created by law, how about a distinction on the basis of safety or environmental reasons? Once comment argued that there was a basis for such distinction:

"There is an environmental justification for applying standards to coastal traffic. Coastal tankers will tend to spend more time in ecologically sensitive waters. Thus ballasting operations may seriously damage the environment, even if low effluent levels can be achieved. Moreover, the risks of groundings and collisions are especially high for smaller coastal tankers which often enter into narrow, shallow, and crowded harbors. Special attention must necessarily be given to their maneuverability characteristics and to means to prevent or reduce outflow should accidents occur. Under such circumstances, it is manifestly unsound, from an environmental perspective, to consider that uniform standards must be applied to *all* tank vessels trading in U.S. navigable waters."<sup>3</sup>

One problem with this argument is that "coastal traffic" is not equivalent to "domestic trade." Reference to a map of North America indicates the "domestic trade" routes from Gulf ports to the east coast of the United States traverse much the same waters as "coastal traffic" between Caribbean or Canadian ports and U.S. east coast ports. This is one major pitfall of domestic trade — foreign trade distinctions in safety and environmental protection regulations. As far as tanker operations are concerned, the discharge criteria in the regulations prohibit any discharge of oily mixtures within 50 miles of land, so ballasting operations will not seriously damage the environment in "these ecologically sensitive waters" as the comment alleges. With respect to tanker accidents, the Coast Guard has expended considerable effort in developing methods to assess the risks associated with various forms of marine transportation in order to improve regulation making efforts and to put them on a more rational basis. Risk assessment is a particularly difficult task. While intuition might lead one to conclude "the risks of groundings and collisions are especially high for smaller coastal tankers which often enter into narrow, shallow and crowded harbors," the Coast Guard has not

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<sup>3</sup>Comments on draft EIS submitted by Center for Law and Social Policy, at page 16. (See page 133 of this final environmental impact statement.)

yet been able to factually support such a conclusion, nor, to our knowledge, has anyone else.

In summary, the Coast Guard does not feel an adequate case for making a distinction in the regulations between U.S. tankers in domestic trade and U.S. tankers in foreign trade on the basis of safety or environmental grounds has been established. Lacking such a basis for distinction in the regulations, or some distinction created by law, the Coast Guard feels it is legally obligated to apply the same rules to both groups of vessels.

Existing Coast Guard vessel inspection regulations use the terms "coastwise" and "coastwise routes" in a different sense than did Public Law 93-153 in moving up the date of the regulations for U.S. flag vessels engaged in coastwise trade. To avoid confusion arising out of these differing usages, the term "domestic trade" is used in this statement and in the proposed regulations to refer to "trade between ports or places within the United States, its territories and possessions, either directly or via a foreign port including trade on the navigable rivers, lakes, and inland waters."

These regulations apply to seagoing tank vessels of 150 gross tons or more. With the exception of subdivision and stability requirements applicable to vessels operating on the Great Lakes, these regulations will not affect vessels certificated by the Coast Guard for Great Lakes, Lakes, Bays and Sounds, and River routes. A different and distinctive rulemaking under development will be made applicable to these vessels. These vessels are of relatively small size (mostly under 2,000 gross tons), routinely engage in very short voyages in waters where no discharge of oil is permitted, have little need to ballast tanks, and are often engaged in "dedicated service" which minimizes the need to clean cargo tanks. The regulatory action under consideration would not be appropriate to these vessels, hence, the need for a different rulemaking.

### **2.3 Description of the Regulations**

These regulations apply to U.S. flag seagoing tankships and

seagoing barges certificated to carry oil in domestic trade.<sup>4</sup> Tank vessels certificated for Great Lakes, Lakes, Bays and Sounds, and River routes are not included in this regulatory action for the reasons discussed above. The standards to be published incorporate the provisions of the Oil Pollution Act Amendments of 1973 (P. L. 93-119, 87 Stat. 424, Oct. 4, 1973).

Definitions contained in the regulations, and repeated below, include several terms which have been used in previous regulations but not carefully defined. They are defined in these regulations to avoid ambiguity.

Provision is made in the regulations for the Coast Guard to accept an equivalent (such as alternative materials, methods, procedures, etc.) of a required design or equipment feature; however, operational methods to effect the control of discharge of oil may not be substituted as equivalent to required design and equipment features.

### **2.4 Definitions**

1. "Length" or "L" means the distance in meters from the fore side of the stem to the axis of the rudder stock on a waterline at 85 percent of the least molded depth measured from the molded baseline, or 96 percent of the total length on that waterline, whichever is greater. In vessels designed with drag, the waterline is measured parallel to the designed waterline.
2. "Amidships" means the middle of the length.
3. "Breadth" or "B" means the maximum molded breadth of a vessel in meters.
4. "Center tank" means any tank inboard of a longitudinal bulkhead.

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<sup>4</sup>The proposed rules, "Tank Vessels in the Domestic Trade," published in the June 28, 1974, Federal Register are reprinted in Appendix A, starting on page 228. These proposed rules are provided for reference in reading this statement. The note on page 228 summarizes the significant changes that will be incorporated in the final rules. Final rules will appear in the Federal Register about 30 days after this statement is made available to the public.

5. "Clean ballast" means the ballast in a tank which, if discharged from a vessel that is stationary into clean, calm water on a clear day, would not —
  - a. Produce visible traces of oil on the surface of the water or on adjoining shorelines; or
  - b. Cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.
6. "Combination carrier" means a vessel designed to carry oil or solid cargoes in bulk.
7. "Deadweight" or "DWT" means the difference in metric tons between the displacement of a vessel in water of a specific gravity of 1.025 at the load waterline corresponding to the summer freeboard and the lightweight of the vessel.<sup>5</sup>
8. "Lightweight" means the displacement of a vessel in metric tons without cargo, oil fuel, lubricating oil, ballast water, fresh water and feed water in tanks, consumable stores, and any persons and their effects.
9. "New vessel" means a vessel that —
  - a. Is constructed under a contract awarded after December 31, 1974<sup>6</sup>;
  - b. In the absence of a building contract, has the keel laid or is at a similar stage of construction after June 30, 1975;
  - c. Is delivered after December 31, 1977; or
  - d. Has undergone a major conversion for which —

<sup>5</sup>This is the definition for deadweight which will appear in the final rules. It is slightly different from the definition contained in the proposed rules.

<sup>6</sup>Contract award, keel laying, and delivery dates used in this definition are identical to the dates used in the June 28, 1974, notice of proposed rulemaking. Reasons for this are discussed on page 42.

- i. The contract is awarded after the effective date of the regulations;
- ii. In the absence of a contract, conversion is begun after June 30, 1975; or
- iii. Conversion is completed after December 31, 1977.
10. "Existing vessel" means any vessel that is not a new vessel.
11. "Major conversion" means a conversion of an existing vessel that —
  - a. Substantially alters the dimensions or carrying capacity of the vessel;
  - b. Changes the type of the vessel;
  - c. The intent of which, in the opinion of the Coast Guard, is substantially to prolong the vessel's service life; or
  - d. Otherwise so alters the vessel or a portion of the vessel that the vessel is no longer considered by the Coast Guard to be an existing vessel.
12. "From the nearest land" means from the baseline from which the territorial sea of the United States is established in accordance with international law.
13. "Instantaneous rate of discharge of oil content" means the rate of discharge of oil in liters per hour at any instant, divided by the speed of the vessel in knots at the same instant.
14. "Oil" means petroleum in any form including oil, sludge, oil refuse, and refined products.
15. "Oil fuel" means any oil used as fuel for the propulsion and auxiliary machinery of the vessel in which it is carried.
16. "Oily mixture" means a mixture with any oil content.

17. "Permeability of a space" means the ratio of the volume within a space that is assumed to be occupied by water to the total volume of that space.
18. "Segregated ballast" means the ballast water that is introduced into a tank which is completely separated from the cargo oil and oil fuel system and which is permanently allocated to the carriage of ballast.
19. "Slop tank" means a tank specifically designated for the collection of cargo drainings, washings, and other oily mixtures.
20. "Tank" means an enclosed space that is formed by the permanent structure of a vessel, and designed for the carriage of liquid in bulk.
21. "Tank barge" means a tank vessel not equipped with a means of self-propulsion.
22. "Tank vessel" means a vessel that is specially constructed or converted to carry liquid bulk cargo in tanks and includes tankers, tankships, tank barges, and combination carriers when carrying oil cargoes in bulk.
23. "U.S. vessel" means a vessel that is owned, documented, or registered in the United States and is not a public vessel.
24. "Wing tank" means a tank that is located adjacent to the side shell plating.
25. "Tankship" means a tank vessel propelled by mechanical power or sail.
26. "Domestic trade" means trade between ports or places within the United States, its territories and possessions, either directly or via a foreign port including trade on the navigable rivers, lakes, and inland waters.

## **2.5 Discharge Criteria**

Seagoing vessels of less than 150 gross tons must retain on board any oily mixtures or transfer them to a reception facility. (Clean ballast and segregated ballast may be discharged overboard.) Seagoing vessels of 150 gross tons or more must discharge oil mixtures overboard in accordance with the criteria

outlined below, or retain the oily mixture on board, or transfer the oily mixture to a reception facility. The use of chemicals to treat an oily mixture to circumvent the discharge requirements is not allowed.

An oily mixture from a cargo tank may be discharged into the sea if a tank vessel complies with all of the following:

1. Is more than 50 nautical miles from the nearest land;
2. Is proceeding en route;
3. Is discharging at an instantaneous rate of oil content not exceeding 60 liters per nautical mile;
4. Does not discharge a total quantity of more than 1/15,000 for an existing vessel or 1/30,000 for a new vessel of the total quantity of cargo that the discharge formed a part; and
5. Has in operation the required oil discharge monitoring and control system.

An oily mixture from a machinery space bilge, except cargo pump rooms, may be discharged into the sea, unless combined with an oily cargo mixture, if the tank vessel complies with all of the following:

1. Is more than 12 nautical miles from the nearest land;
2. Is proceeding en route;
3. Is discharging an effluent with an oil content of less than 100 parts per million; and
4. Has in operation the required oil discharge monitoring and control system or the required oily water separating equipment.

Oil-water separating and filtering equipment will be required on new and existing tank vessels. These devices will be used for oily bilge water and ballast water from oil fuel tanks. All discharges of effluent from the cargo spaces of a tank vessel will be required to go through a monitoring and control system which

will ensure that any oil discharge is automatically stopped when the oil content of the effluent exceeds that permitted by the discharge criteria. The monitoring and control system must be fitted with a recording device to provide a continuous permanent record of the oil content of the effluent. All of this equipment is essential in practicing the improved LOT system for shipboard handling cargo oil. The proposed regulations require such equipment; but the installation of the equipment will not be required until after the effective date of regulations publishing specifications, testing, labeling and approval procedures for the equipment. The detailed specifications of these systems and equipment are under development. (Refer to page 48 for additional discussion.)

Relief from the discharge criteria is given in those cases where safety of the vessel, saving of life at sea, or accidental damage to a vessel or its equipment is involved; except if the owner, master or person in charge acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result.

New tank vessels will not be allowed to put ballast water in oil fuel tanks.

An important feature of these new rules is the changes they make in the definitions of the terms *oil* and *oily mixture* used in the regulations. Under the old definitions, based on the Oil Pollution Act of 1961 (33 U.S.C. 1001-1015), *oil* is limited to crude oil, fuel oil, heavy diesel oil, and lubricating oil. An *oily mixture* is presently defined as a mixture containing over 100 parts per million of oil. Under these definitions the discharge of so-called "non-persistent" oils (such as gasoline and other refined products) is not prohibited, even inside the 50 mile prohibited zone. The new definitions, paralleling those in the Federal Water Pollution Control Act, as amended, (P. L. 92-500) and the 1973 Marine Pollution Convention, cover petroleum in any form, including oil, sludge, and oil refuse, and in any quantity. Thus, the criteria in the new regulations are applicable to a much wider range of discharges than are those presently in force.

These regulations will change the requirements for entries in the Oil Record Book both for tank vessels and for ships other than tank vessels. On tank vessels entries must be made whenever the following operations take place:

1. Loading of oil cargo;
2. Internal transfer of oil cargo during voyage;
3. Opening or closing before and after loading and unloading operations of valves or similar devices which inter-connect cargo tanks;
4. Opening or closing of means of communication between cargo piping and seawater ballast piping;
5. Opening or closing of ships' side valves before, during and after loading and unloading operations;
6. Unloading of oil cargo;
7. Ballasting of cargo tanks;
8. Cleaning of cargo tanks;
9. Discharge of ballast except from segregated ballast tanks;
10. Discharge of water from slop tanks;
11. Disposal of residues;
12. Discharge overboard of bilge water which has accumulated in machinery spaces while in port, and the routine discharge at sea of bilge water which has accumulated in machinery spaces;
13. The discharge of oil or oily mixture from a ship for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving of life at sea; or,
14. The escape of oil, or of oily mixture, resulting from damage to the ship or unavoidable leakage; or,
15. Accidental or other exceptional discharges or escapes of oil from tankers or ships other than tankers.

Ships other than tankers will now be required to make entries in the Oil Record Book when operations 13, 14, or 15 above take place.

The discharge controls now in effect are discussed here for comparison to the new regulations. The Oil Pollution Act of 1961, as amended, established certain prohibited zones within which discharges of oil or oily mixtures with an oil content greater than one hundred parts per million (ppm) by tankers over 150 gross tons are prohibited. It also prohibits these same discharges by ships other than tankers, over 500 tons in gross tonnage, within any of the prohibited zones, except when the ship is proceeding to a port not provided with adequate facilities for the reception of these oily mixtures. Such discharges are to be made as far as practicable from land. The prohibited zones as established are defined as all areas within 50 miles from the nearest land, subject to extensions made in accordance with the terms of the 1954 Convention and published in 33 CFR 151. Ships of 20,000 gross tons or more, built after May 18, 1967, are prohibited from discharging oil or an oily mixture anywhere in the oceans except when, in the opinion of the master, special circumstances make it neither reasonable nor practicable to retain the oil or oily mixture on board. In this situation, a discharge is permitted outside of a prohibited zone. Discharges prohibited by the Convention do not apply when a discharge is made for the purpose of securing the safety of the ship, preventing damage to a ship or cargo, or saving life at sea, nor do the prohibitions apply to the escape of oil or oily mixture resulting from damage to a ship or unavoidable leakage, nor to the discharge of residue arising from the purification or clarification of fuel oil or lubricating oil provided such discharge is made as far from land as practicable. The prohibitions also do not apply to the discharges from the bilges of a ship of an oily mixture containing no oil other than lubricating oil which has drained or leaked from machinery spaces.

Regarding the present Oil Record Book requirements, this book must contain entries whenever any of the following operations takes place in the ship:

1. Ballasting of and discharge of ballast from cargo tanks of tankers;
2. Cleaning of cargo tanks of tankers;
3. Settling in slop tanks and discharge of water from tankers;
4. Disposal from tankers of oily residues from slop tanks or other sources;
5. Ballasting, or cleaning during voyage, of bunker fuel tanks of ships other than tankers;
6. Disposal from ships other than tankers of oily residues from bunker fuel tanks or other sources;
7. Accidental or other exceptional discharges or escapes of oil from tankers or ships other than tankers;
8. The discharge of oil or oily mixture from a ship for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving of life at sea; or,
9. The escape of oil, or of oily mixture, resulting from damage to the ship or unavoidable leakage; or,
10. The discharge of residue arising from the purification or clarification of fuel oil or lubricating oil; or,
11. The discharge of oil or oily mixture from a ship of 20,000 gross tons or over for which the building contract is placed on or after May 18, 1967, including a tanker.

## 2.6 Proposed Design Requirements

### 2.6.1 Segregated Ballast

A new tank vessel of 70,000 tons deadweight or more must be designed with segregated ballast tanks. The combined capacity of the segregated ballast tanks must be of sufficient size that the vessel can operate safely without recourse to the use of oil tanks for water ballast. To ensure sufficient capacity of the ballast tanks the following draft and trim design criteria are applied to the vessel:

- a. The molded draft amidships (dm) in meters without taking into account any vessel deformation may not be less than:

$$dm = 2.0 + 0.02L$$

- b. The trim by the stern in association with draft amidships (dm) may be no more than 0.015L.
- c. The minimum allowable draft at the after perpendicular is that which is necessary to obtain full immersion of the propeller(s).

Ballast water may be carried in a cargo tank during abnormally severe weather if more ballast water than can be carried in segregated ballast tanks is required for the safety of the vessel. This ballast water must be processed and discharged in compliance with the discharge criteria and an entry recorded in the Oil Record Book.

The rules proposed June 28, 1974, have been changed to include in the final rules a requirement for distribution of segregated ballast spaces. Segregated ballast spaces must be distributed between the cargo tanks and the vessel's hull or between cargo wing tanks along the shell plating of the vessel in accordance with the criteria detailed in a new Appendix C

included in the final regulations.<sup>7</sup> The distribution of segregated ballast capacity is not specified by the 1973 Marine Pollution Convention. Study has shown that distribution of required ballast space can be beneficial in mitigating the effects of collision or stranding accidents. The degree of effectiveness of such spaces depends on a number of factors discussed in Appendix C of this statement along with the criteria for distributing ballast spaces. Calculations verifying the vessel meets the criteria for distribution of segregated ballast spaces must be submitted to the Coast Guard for review.

### 2.6.2 Pumping, Piping and Discharge Arrangements

A pipeline for the discharge into the sea of an effluent that is in compliance with the discharge criteria must terminate on the open deck or on the vessel's side above the waterline in the deepest ballast condition. Existing vessels which carry some segregated ballast will not be required to modify pump room piping to enable them to discharge *segregated ballast* above the waterline in the deepest ballast condition. In the case of new vessels, an additional piping arrangement may be allowed by the Coast Guard to discharge segregated ballast and clean ballast below the waterline while the vessel is in port or at an offshore terminal.

The proposed regulations will require a manifold be located on the weather deck on each side of the vessel for connection to reception facilities in order to transfer dirty ballast water or oil contaminated water.

A new tank vessel must also have a designated area on the weather deck or above that is (a) located so that the pipeline terminations and the manifold referenced above may be visually observed; and (b) equipped with either a means to directly stop the discharge of effluent into the sea or a positive communication system, such as a telephone or radio, between the observation area and the discharge control position.

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<sup>7</sup>These criteria are described on page 241 in Appendix C, Report of Study Group on Location of Segregated Ballast, which gives details on the study which developed them and the text to be included in the final regulations.

Further, a tank vessel must have a fixed piping system designed to allow the transfer of dirty ballast residue and tank washings from a cargo tank into a slop tank.

#### **2.6.3 Slop Tanks**

New tank vessels of less than 70,000 DWT and all existing tank vessels must have at least one slop tank. A new vessel of 70,000 DWT or more must have two slop tanks. It is the Coast Guard's intention that, on an existing tank vessel, a cargo tank may be used as the required slop tank so long as the necessary piping modifications are made. A slop tank must have the capacity to retain slop from tank washings, oil residues, and dirty ballast residues, but the total capacity may not be less than three percent of the oil capacity of this vessel except two percent of the oil capacity of the vessel will be accepted if (1) there is the required amount of segregated ballast space or (2) educators that use water in addition to the washing waters are not fitted. Each slop tank must be designed with a separate inlet and outlet. It is the Coast Guard's intention to allow slop tanks to be used to carry cargo on the loaded leg of a voyage, since they are not required for treating oily mixtures during that time.

#### **2.6.4 Oily Residue Tank (Sludge)**

A tank vessel of 400 gross tons or more must have a tank that receives and holds oily residue resulting from purification of fuel and lubricating oil and oil leakages in machinery spaces. This sludge tank must have an adequate capacity that is determined by the type of machinery installed on the vessel and the maximum fuel oil capacity. Each oily residue tank on a new tank vessel must be designed to facilitate cleaning and transfer of residue to a reception facility.

#### **2.6.5. Cargo Tank Arrangement and Size**

The Oil Pollution Act Amendments of 1973 revised the Oil Pollution Act, 1961 (75 Stat. 402, 33 U.S.C. 1001 et seq.). In Section 2(5) of the new Act, it is required that tankers built in

the United States after the effective date of the section be built in compliance with Annex C of the 1971 Amendments to the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954. Annex C to the 1971 Amendments is concerned with tank arrangement and maximum size. In accordance with the Act, tankers built before the effective date of Section 2(5) are required to be in compliance within two years after that date if the delivery of the tanker is after January 1, 1977, or if delivery is before January 1, 1977, and the building contract is placed after January 1, 1972, or when there is no building contract and the keel is laid or the tanker is at a similar stage of construction after June 30, 1972. The effective date of Section 2(5) is the date of enactment or the date the 1971 amendments to the 1954 Convention, as amended, are ratified or accepted with the advice and consent of the Senate of the United States, whichever is the later date. As of the date of this statement, ratification has not occurred.

Cargo tank size limitations are carried into the proposed regulations with the effective dates specified in Public Law 93-119. The change in dates affects existing vessels as defined in the definition section. The requirements of cargo tank arrangement and size apply to (1) new tank vessels, (2) tank vessels delivered after January 1, 1977, and (3) existing tank vessels: (a) delivered after January 1, 1977; or (b) delivered before January 1, 1977, and for which the building contract is awarded after January 1, 1972; or in the case where no building contract exists, the keel is laid or the vessel is at a similar stage of construction after June 30, 1972.

Cargo tanks must be of such size and arrangement that:

- a. The hypothetical outflow for side damage or for bottom damage anywhere within the length of the vessel must not exceed 30,000 cubic meters or  $400\sqrt{DWT}$ , whichever is greater, limited to a maximum of 40,000 cubic meters.
- b. The volume of wing and center cargo tanks must be less than the allowable volumes.

- c. The length of cargo tanks must be less than the allowable length.

The hypothetical and maximum hypothetical outflows, allowable volumes and allowable lengths are calculated in accordance with Appendix A of the proposed regulations.

#### **2.6.6. Subdivision and Stability**

The following damage stability criteria will be imposed on new tank vessels:

- a. The final waterline, taking into account sinkage, heel and trim, must be below the lower edge of any opening through which progressive flooding may take place.
- b. In the final stage of flooding, the angle of heel due to unsymmetrical flooding is not to exceed 25 degrees, except that this angle may be increased to 30 degrees if no deck edge immersion occurs.
- c. The stability in the final stage of flooding is to be investigated and may be regarded as sufficient if the righting lever curve has a range of at least 20 degrees beyond the position of equilibrium in association with a maximum residual righting lever of at least 0.1 meter.

Calculations demonstrating compliance with the damage stability criteria must be submitted to the Coast Guard for review.

Loading and damage assumptions must be made before the damage stability criteria can be applied. These assumptions are detailed in Appendix B of the proposed regulations. The loading assumptions specify that the vessel be floating at any operating draft which reflects an actual partial or full load condition, consistent with trim and strength of the vessel. Appendix B requires that the extent and character of the assumed side or bottom damage, defined in Appendix A, must be applied, except longitudinal bottom damage within 0.3L from the forward

perpendicular must be assumed to be the same as that for side damage. The damage is applied to all conceivable locations along the length of the vessel with some exceptions regarding the engineroom for smaller vessels. Details for handling damage involving a transverse bulkhead, damage between transverse bulkheads spaced less than the extent of assumed damage, damage involving stepped bulkheads and damage within which pipes, ducts and tunnels are situated are also specified. These proposed regulations will require that the master be provided with information which has been approved by the Coast Guard, which when followed, will ensure that the vessel will comply with the damage stability requirements.

Appendix A of the regulations details damage assumptions for longitudinal, transverse; and vertical extent for use in determining the hypothetical outflow in both side damage and bottom damage cases. The detail calculations for hypothetical outflow are then specified along with some special assumptions if double bottoms or double sides are fitted. Incentive in the nature of credit on outflow is allowed for arrangements incorporating double bottoms and/or double sides.

Included as part of the cargo tank arrangement requirements are special provisions for ensuring the segregation of cargo tanks from each other through the use of valves or similar devices in piping systems running through the tanks. These special provisions are to reduce oil outflow in case of damage.

Cargo tank size limitation is the only section of the design requirements in the proposed regulation which is not totally new. This section was enacted by reference in the Oil Pollution Act of 1973 (P.L. 93-119); however, it does not become effective until the 1971 amendments to the 1954 Convention have been ratified by the United States.

### 3. PROBABLE IMPACT OF THE PROPOSED ACTION ON THE MARINE ENVIRONMENT

#### 3.1 The Need for Regulations

The desirability of reducing the occurrence and effects of oil pollution is accepted by nearly everyone. Increasing concern during the last several years over the possible effects of petroleum hydrocarbons in the marine environment has resulted in a number of studies and in the passage of new laws aimed at reducing oil pollution. This concern has also been expressed in terms of goals for eliminating or reducing oil pollution such as that contained in IMCO Assembly Resolution A.237(VII) (October 12, 1971): "The complete elimination of intentional pollution by oil and other harmful substances and the minimization of accidental discharges of such substances \* \* \* by 1975 if possible, but certainly by the end of the decade."

Many of the results and pronouncements to the public by experts on the possible effects of oil in the marine environment have been conflicting; some have been alarming; most have been difficult for laymen to evaluate and put in perspective.<sup>8</sup>

Recognizing the need for a comprehensive review of the state of knowledge in this area, the Ocean Affairs Board of the National Research Council—National Academy of Sciences organized a workshop on the inputs, fates, and effects of petroleum in the marine environment which was held in May 1973. Background papers were reviewed and discussed by some 60 scientists and engineers from academic, governmental, and industrial organizations, both U.S. and foreign. Based on the results of this workshop and additional information developed in the intervening period, the National Academy of Sciences published a report in January 1975 entitled, *Petroleum in the Marine Environment*.

The Coast Guard believes that this report represents the best collective judgement of experts in the various fields of science and

<sup>8</sup>There have been some widely publicized claims that the ocean is rapidly becoming irreparably contaminated by oil spills. For example, Jacques Cousteau has stated that 40 percent of all life in the sea has been eliminated by man's activities. (Reference 4)

engineering concerned and that the report forms a sound basis for judgements concerning the need for pollution prevention measures. Because the NAS report makes available to the public in a concise form much detailed information on the fates and effects of oil in the marine environment, the Coast Guard believes no attempt need be made to duplicate such information and analysis here in this impact statement.<sup>9</sup>

Section 5 of the NAS report, containing the conclusions reached, is included in Appendix B of this impact statement. The following statements quoted from that material are particularly relevant.

The fate of most petroleum spills on the sea appears to be a combination of evaporation and decomposition in the atmosphere plus oxidation by chemical and biological means to CO<sub>2</sub>. The heavier fraction of petroleum forms pelagic tar. The total amount of petroleum on the open sea in the form of specks and floating lumps is estimated to be less than a year's input. Some fraction of this amount eventually becomes washed up on beaches and incorporated into coastal sediments. It is this portion of spilled oil that causes most public complaints. Tar masses are appearing in increased quantity in formerly unpolluted areas such as the East Coast of Africa, the beaches of southern France, and many islands in both the Indian and Atlantic oceans. Recent reports clearly document the quantity and nature of these tar residues in areas such as Bermuda. The fact that these tars frequently have inclusions of paraffinic wax such as that originally formed on tanker compartment walls and that they have much higher iron contents than natural petroleum is evidence that most of these materials originate from tanker washings and bilge discharges, rather than diffused sources of petroleum input or seeps.

When oil becomes incorporated in coastal sands protected from the weathering effects of sun and oxygen, its residence time may be measured in years or decades. Unless steps are taken to reduce the input to a level that can be assimilated through natural degradation processes, we will all have to reconcile ourselves to oil-contaminated beaches.

<sup>9</sup>The report is available from the National Academy of Sciences Printing and Publication Office, 2101 Constitution Avenue, N.W., Washington, D.C. 20418 at \$6.50 per copy.

Fish do not appear to suffer from oil spills as much as seabirds and benthic organisms. Fish may acquire an oily flavor from feeding on oil-contaminated organisms, and widespread tainting of fish flesh may persist as long as significant quantities of oil are present. A long-range hazard exists for some birds such as auks and penguins because they have such slow reproductive rates that marked increases in mortality may be causing their gradual elimination.

The most damaging, indisputable adverse effects of petroleum are the oiling and tarring of beaches, the endangering of seabird species, and the modification of benthic communities along polluted coastlines where petroleum is heavily incorporated in the sediments. The first two of these effects occur predominantly from discharges and spills of tanker and ship operations. The toxicity and smothering effect of oil caused mortality in all major spills studied, with pelagic diving birds and intertidal to subtidal benthic organisms being most affected. Mortality was greatest where oil spills were confined to inshore areas with abundant biota. The effects were generally quite localized, ranging from a few miles to tens of miles, depending on the quantity of petroleum involved.

In general, much more research regarding the fates and effects of petroleum hydrocarbons in the marine environment is needed. We know that the quantity of floating tar in the open ocean and of tar along coastlines has been increasing, that major spills and localized continuous discharges of petroleum hydrocarbons have damaged various species of marine life, and that low levels of petroleum may affect the behavior patterns of certain species. Studies to date indicate that areas polluted with petroleum hydrocarbons "recover" within weeks or years (depending on local conditions and the characteristics of the petroleum); however, composition of the local biological communities may be altered. The oceans have considerable ability to purify themselves by biological and chemical actions. A basic question that remains unanswered is, "At what level of petroleum hydrocarbon input to the ocean might we find irreversible damage occurring?" The sea is an enormously complex system about which our knowledge is very imperfect. The ocean may be able to accommodate petroleum hydrocarbon inputs far above those occurring today. On the other hand, the damage level may be within an order of magnitude of present inputs to the sea. Until we can come closer to answering this basic question, it seems wisest to continue our efforts in the international control of inputs and to push forward research to reduce our current level of uncertainty.

To estimate as accurately as possible the amount of petroleum hydrocarbons entering the marine environment, a panel of experts from various professional disciplines was assembled as part of the NAS effort. Best estimates were developed for each significant petroleum source based on the limited reliable data available and modified by judgement based on experience. Table 1, taken from the NAS report, summarizes estimates of inputs from all significant petroleum sources. These sources range in type from extremely diffuse sources to occasional major point sources of variable location such as tanker accidents. The report points out that the importance or significance of a particular source depends not only on its relative size, but also on the nature of the source and the scope and degree of possible effects.

The figures in Table 1 indicate "Transportation" sources contribute approximately 35 percent (2.113/6.113) of the total ocean inputs. Jumping ahead for a moment, to the more detailed estimates of oil inputs from tankers presented in Table 4, tankers contribute about 22 percent (1.35/6.113) of the worldwide total. Approximately 18 percent (1.087/6.113) of the worldwide total is from tanker tank cleaning and ballasting.

The problem of oil pollution from tank vessels is a very complex one. While a number of factors are known, many aspects are unknown. As with any complicated problem, the answer should come easier if it is approached systematically. In this case, that means gathering information about oil pollution from tank vessels, analyzing the information to understand the problem as well as possible, and then developing regulations which are responsive to the problems.<sup>10</sup>

This is a continuous process. As more is learned, improved solutions will be forthcoming. Action cannot be postponed until all the facts are known. But, on the other hand, the problem must be understood well enough that the regulations are worth the cost and help achieve the goal.

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<sup>10</sup>Of course, the Coast Guard is not the only one working on solutions, nor are regulations the only way to achieve improvements.

The hazards to the marine environment created by tanker oil pollution may be categorized as those due to:

- routine, long-term injection of oil into the world's oceans;
- fairly frequent, but low level introduction of oil into a specific locality such as around an oil terminal or harbor;
- relatively infrequent catastrophic large spills concentrated in a relatively small geographic area.

**Table 1. Budget of Petroleum Hydrocarbons Introduced into the Oceans**

Source	Input Rate (mta)*	
	Best Estimate	Probable Range
Offshore production	0.08	0.08-0.15
Transportation		
LOT <sup>b</sup> tankers	0.31	0.15-0.4
Non-LOT tankers	0.77	0.65-1.0
Dry docking	0.25	0.2-0.3
Terminal operations	0.003	0.0015-0.005
Bilges, bunkering <sup>d</sup>	0.5	0.4-0.7
Tanker accidents	0.2	0.12-0.25
Nontanker accidents	0.1	0.02-0.15
Coastal refineries	0.2	0.2-0.3
Atmospheric rainout <sup>c</sup>	0.6	0.4-0.8
Coastal municipal wastes	0.3	—
Coastal, nonrefining, industrial wastes	0.3	—
Urban runoff	0.3	0.1-0.5
River runoff	1.6	—
SUBTOTAL	5.513	
Natural seeps	0.6	0.2-1.0
<b>TOTAL</b>	<b>6.113</b>	

\*mta, million metric tons annually.

<sup>b</sup>LOT is an abbreviation for "Load-on-top".

<sup>c</sup>Based upon assumed 10 percent return from the atmosphere.

<sup>d</sup>For all ships equivalent to an average loss per ship of about 10 tons per annum.

Source: National Academy of Sciences Report, *Petroleum in the Marine Environment*, Washington, D.C., 1975, page 6.

These risks are not all the same. The environmental impact in each case depends on a great many factors, including size, frequency, and locality of oil input, oil type, oceanographic conditions, meteorological conditions, turbidity, season, biota types present, and methods of spill cleanup. The "risk" or expected loss depends not only on the damage that will result from some oil input, but on the likelihood of that input occurring. At present, no systematic method of assessing and comparing these various risks is available. Much of the information needed to determine the risks and impacts of spills has not been developed. There is no way of comparing, for example, the risks associated with the oil entering the ocean from routine tank cleaning to those connected with some smaller amount spilled as a result of a tanker grounding concentrated in a relatively small geographic area.

Ideally, pollution prevention regulations should be aimed directly at reducing risk of environmental damage. However, since direct assessment of such risks is not possible, the Coast Guard feels that highest priority must be placed on bringing the largest volume of oil inputs under control. Tank cleaning and ballasting of tankers are responsible for approximately 80 percent of the oil entering the oceans from tankers and about 18 percent of the worldwide total.<sup>11</sup>

Because of tanker ownership and trade patterns and the international nature of world shipping, the Coast Guard has concluded that *international* control of oil inputs from tank cleaning and ballasting of tankers is absolutely essential. The 1973 Marine Pollution Convention, while not achieving all that the Coast Guard would have liked, particularly in the area of accidental protection, offers the potential for effectively controlling oil inputs from tanker operations and reducing them to acceptable levels. In the Coast Guard's judgement, the Convention deserves wholehearted U.S. support and should serve as the basis for regulations for U.S. ships and foreign ships entering U.S. waters issued under the Ports and Waterways Safety Act of 1972.

<sup>11</sup>Tanker accidents contribute some 15 percent of the tanker total and about 3 percent of the world total.

### 3.2 Oil Inputs to the Oceans from Tankers

An understanding of oil inputs to the marine environment from tankers is needed before the impact of these regulations can be assessed. Information on the tank vessel population, how tank vessels are utilized, and how this utilization may contribute to oil pollution is presented below.

In this statement the term *tanker* has been used to refer generally to all vessels carrying oil cargoes in bulk, both ships and barges. There are about 6,300 tankships in the world today, ranging from small harbor and coastal tankers to very large crude oil carriers of up to 500,000 deadweight tons. There are currently about 230 active U.S. tankships of 1,000 gross tons or more. To meet anticipated future needs, there were, as of January 1, 1975, 1,118 vessels of 12,000 tons deadweight and above on order worldwide. Averaging nearly 160,000 tons deadweight in size, this fleet of about 176 million tons capacity was almost equal in carrying capacity to the existing world fleet of tankers (about 250 million tons). However, the demand for tankers has decreased as a result of a sharp drop in the growth of world oil consumption due to four-fold price increase by cartel countries last year. This has led to a surplus of tonnage, layups of idle tankers, and cancellation of orders for new tankers. Almost no new orders for large tankers were placed during the last 6 months of 1974; about 40 contracts (totaling 9 million tons deadweight) were cancelled as a direct result of tanker market conditions. (6)<sup>12</sup> The number, size and type of new ships built in the future depends on a great number of factors including energy policy, oil imports, economic conditions, development of U.S. deepwater ports, the tanker market, and the effect of Maritime Administration subsidy program on U.S. tanker construction. Table 2 provides additional information on U.S. and world tankship fleets.

<sup>12</sup>Numbers in ( ) refer to references listed on pages 225-227.

TABLE 2. U.S. and World Tank Ship Fleets Existing and on Order as of December 31, 1973  
(Ocean-going Vessels 2000 Gross Tons and Over)

Deadweight Tonnage	Existing			Under Construction or on Order			<i>Exhibit X</i>				
	Worldwide	U.S.	Worldwide	U.S.	No.	Deadweight*		No.	Deadweight*	No.	Deadweight*
Under 20,000	1,566	18.2	95	1.3	173	1.5	0	0	0	0	0
20,000 to 70,000	1,893	70.5	198	6.5	301	11.2	39	1.7	1.7	39	1.7
Over 70,000	1,104	168	19	1.8	779	170	23	3.4	3.4	23	3.4
Total	4,563	257	312	9.6	1,253	183	62	5.1	5.1	62	5.1

\*Deadweight in million deadweight tons.

Source: Sun Oil Company, *Analysis of World Tank Ship Fleet, December 31, 1973*, St. Davids, Penna. 19087.

Tank barges have been used to carry oil for many years on our inland river system, and larger seagoing barges are now used to transport oil on coastwise and ocean routes. As of January 1, 1974, there were approximately 350 tank barges certified by the Coast Guard for ocean and coastwise routes. These ranged in size from 150 deadweight tons up to about 35,000 deadweight tons and 600 feet in length. The large integrated tug-barge combinations now entering service operate much as tankships do, washing tanks underway and ballasting cargo tanks on ballast voyages. More conventional seagoing towed-barge operations do not involve washing tanks at sea or ballasting cargo tanks.

Total world oil production in 1973 was approximately 2,800 million metric tons (7). Of this total, an estimated 1,400 million tons of crude oil and 290 million tons of products were transported by sea in the 6,000 tank vessels mentioned above.

Tankships and barges may be broken down into two groups according to how they are used — those that carry crude oil from where it is produced to where it is to be refined, and those that carry petroleum products from refineries to terminals and distribution points. These are not fixed groups — vessels may shift from one trade to another as transportation requirements change. The current patterns of tanker utilization have evolved over the years as a result of prevailing trade patterns, economic factors, and refinery locations.

In general, larger tankers (over 100,000 deadweight tons) are used for carrying crude oil and smaller tankers (under 40,000 DWT) are used to transport refined products. Intermediate sized ships (40,000 DWT-100,000 DWT) are often used to carry either crude oil or residual fuel oils resulting from the refining process. The U.S. flag tankship fleet makes up only a small fraction of the world fleet, and, in general, U.S. tankers are smaller and older. New tank vessels, added to the U.S. fleet as a result of the Merchant Marine Act of 1970, have countered this trend to some degree. Most of the U.S. flag tankship fleet is engaged in transportation of crude oil or refined products on domestic routes (protected from foreign competition) or to the U.S. from the Caribbean or other nearby foreign areas. A small number of recently built large tankers are used to carry crude oil in world

trade. A number of these vessels will be used to carry crude oil from Alaska to the U.S. once the Trans-Alaska Pipeline is completed. Estimates of vessel requirements and vessels available for this service are shown in Appendix D.

Since current patterns of tanker utilization have evolved as a result of world trade patterns, economic factors, and refinery locations, changes in these variables will result in new patterns of tanker utilization. Such factors as location of new refineries and reduction of oil imports will influence transportation patterns. No attempt has been made in this statement to predict such factors or their effects on tanker utilization.

Information on the shipment of oil into U.S. ports during 1972 is presented in Table 3. Crude oil and residual fuel movements have been lumped together in Table 3 since they represent similar problems as far as shipboard pollution control measures are concerned.

**TABLE 3. Transportation of Oil by Water into U.S. Coastal Ports<sup>1</sup>**

Cargo	Source	Shipment On	Estimated Amount (mta) <sup>2</sup>
Crude oil and residual fuel	Foreign	Foreign Ships <sup>3</sup>	186
Crude oil and residual fuel	Foreign	U.S. Ships <sup>3</sup>	10
Crude oil and residual fuel	U.S.	U.S. Ships	62
Crude oil and residual fuel	U.S.	U.S. Barges	7
Refined oil	Foreign	Foreign Ships <sup>3</sup>	23
Refined oil	Foreign	U.S. Ships <sup>3</sup>	1
Refined oil	U.S.	U.S. Ships	79
Refined oil	U.S.	U.S. Barges	19
<b>TOTAL</b>			<b>387</b>

<sup>1</sup>Amounts are for calendar year 1972 and are taken from U.S. Army Corps of Engineers, *Waterborne Commerce of the United States*, 1972.

<sup>2</sup>mta, million metric tons per year.

<sup>3</sup>The assumption has been made that 95 percent of the oil from foreign sources is transported in foreign flag ships and 5 percent in U.S. flag ships.

*Exhibit X*

It is important to understand how tankers contribute to oil inputs. Figure 1 shows one way the tanker oil pollution problem may be broken down — according to source.<sup>13</sup>

Tankers contribute to the oil entering the marine environment in four basic ways:

- a. tank cleaning and ballasting
- b. tanker bilges pumped overboard and bunkering spills
- c. spills during loading and unloading of cargo at terminals
- d. tanker accidents

No one knows exactly how much oil enters the ocean from each of these sources. A number of estimates have been made. These estimates vary widely depending on the choice of assumptions and the information available concerning:

- amount of oil retained on board after discharge of cargo ("clingage")
- number of tanks washed
- oil content of water discharged
- amount of oil leaked to bilges
- quantities of dirty machinery lube oil and purifier sludge produced
- cargo handling spills
- spills due to tanker accidents

Uncertainties concerning information on such factors makes

<sup>13</sup>The Coast Guard has already implemented regulations affecting some portions of the problem. Regulations for vessels and oil transfer facilities contained in 33 CFR 154-156 are aimed primarily at spills occurring at the vessel-terminal interface during transfer operations, although they also require storage and transfer facilities on vessels for oil bilge water. Requirements for bridge-to-bridge radiotelephone and development of vessel traffic systems are aimed at reducing vessel accidents.

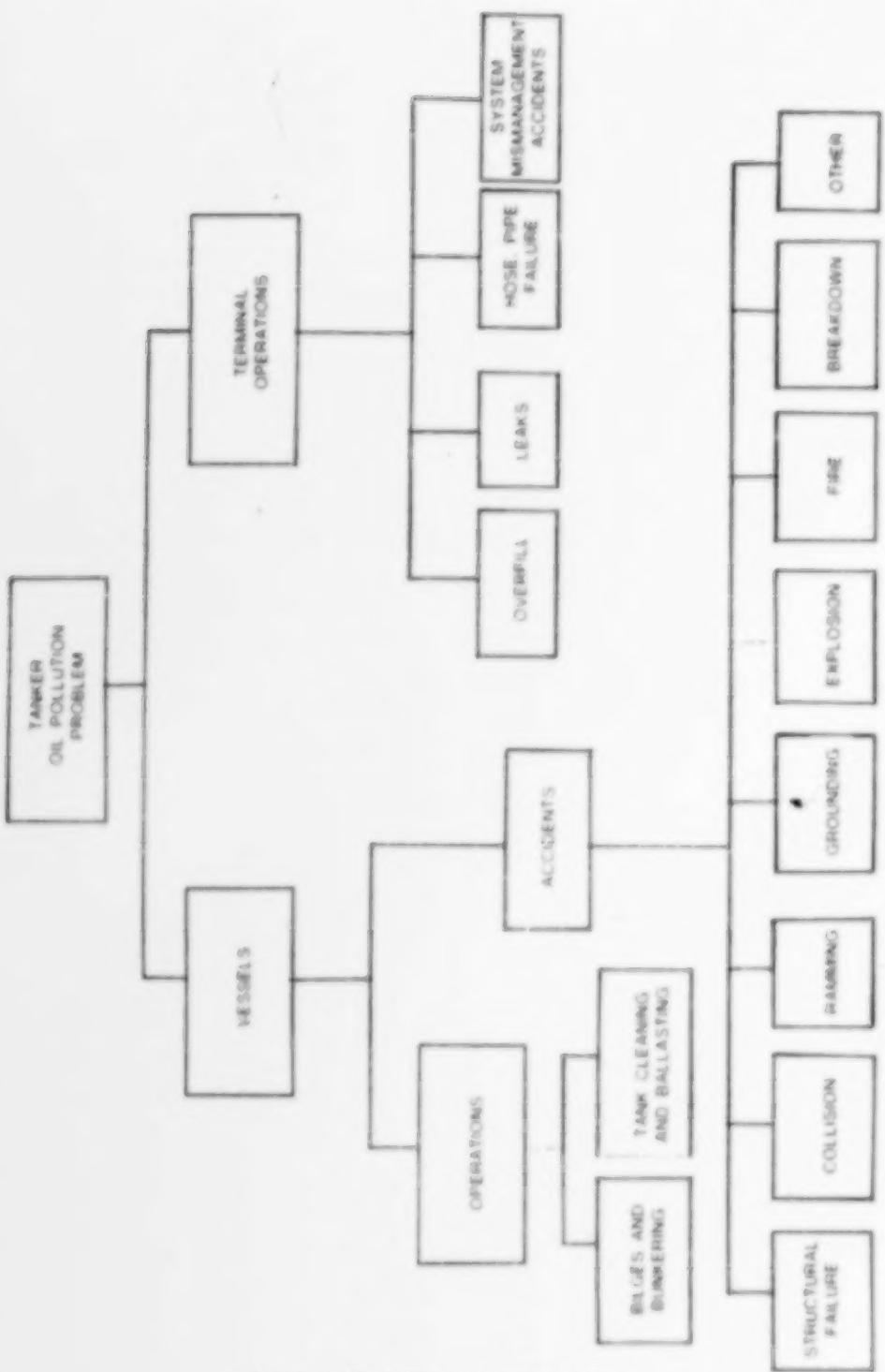
*Exhibit X*

Figure 1. The Tanker Oil Pollution Problem

*Exhibit X*

responsible estimates hard to make. But such estimates are necessary to give some idea of the impact of new regulatory requirements. In response to comments on the draft statement, an effort has been made in Table 4 and Figure 2 to estimate oil inputs from various tank vessel sources. Supporting assumptions and calculations are in Appendix E.

The detailed geographic distribution of these oil inputs over the oceans is not known. Obviously, tank washings and oily bilge water are pumped out along tanker routes. Cargo handling spills occur at terminals. The majority of tanker accidents resulting in oil outflows occur at or near harbors in coastal waters (within 50 miles of land). (Reference 4)

The NAS Report (Reference 5 and Appendix B) summarizes past work on determining distribution of oily residue in the ocean. More current efforts are described in reference (9) including a program being conducted by Exxon Corporation under sponsorship of NOAA and MARAD for collecting and analyzing water samples along selected tanker routes.

*Exhibit X*

TABLE 4. Estimated Annual Oil Inputs to the Oceans from Tankers

SOURCE	Estimated Oil Inputs (Thousands of Metric Tons Per Year)		
	Worldwide	Foreign Trade	U.S. Waters
U.S. Vessels	Domestic Trade	U.S. Waters	
Tank cleaning and ballasting			
Ballasting and deballasting operations including associated tank washing, crude oil(1)	426	3	24
Tank cleaning for removal of sludge buildup, crude oil(1)	259	1.8	16
Tank cleaning of refined product tankers for ballast and to insure purity of next cargo	162	0.5	43
Tank cleaning prior to shipyard repairs	240	1.8	7.2
SUBTOTAL, FOR TANK CLEANING AND BALLASTING	1,087	7.1	90.2
Tanker bilges and bunkering	60	0.6	2.3
Terminal operations	3	0.02	0.4
			0.6

Table continued on next page

TABLE 4. (Cont'd) Estimated Annual Oil Inputs to the Oceans from Tankers  
 Estimated Oil Inputs  
 (Thousands of Metric Tons Per Year)

SOURCE	Worldwide			U.S. Waters	
	Foreign Trade	Domestic Trade	U.S. Ships	Foreign Ships	U.S. Waters
Tanker accidents	6	1	1	0.5	
Breakdowns	40	1	0.4	0.4	
Collisions	20	0.6	0.8	0.8	2.4
Explosions	1	0.6	0.3	0.3	0.5
Fires	50	0.6	0.8	0.8	1.2
Groundings	3	0.3	0.3	0.3	0.5
Ramming	70	6 <sup>(12)</sup>	6 <sup>(12)</sup>	6 <sup>(12)</sup>	
Structural Failures	10	0.6	0.5	0.5	4.6
Other (including flooding of machinery space)	200	0.6	0.5	0.5	
SUBTOTAL FOR TANKER ACCIDENTS					
TOTAL OIL INPUTS FROM TANKERS	1,350	8.3	101.4	101.7	111.7

## NOTES:

1. For U.S. vessels and U.S. waters, figures shown include those from both crude oil and residual oil. Crude and residual oils have been treated together because presently available LOT methods work for both.
2. Total loss of a 29,950 deadweight ton vessel is included.
3. Estimates for operational pollution inputs are described in Appendix 2.
4. Estimates for tanker accidents are based on period 1969-1973 with data collected from Lloyds Weekly Casualty Reports, CG pollution and vessel casualty reports.

Exhibit X

Exhibit X

SOURCES OF THE ESTIMATED 1.35 MILLION TONS OF OIL ENTERING THE OCEANS EACH YEAR FROM TANKERS

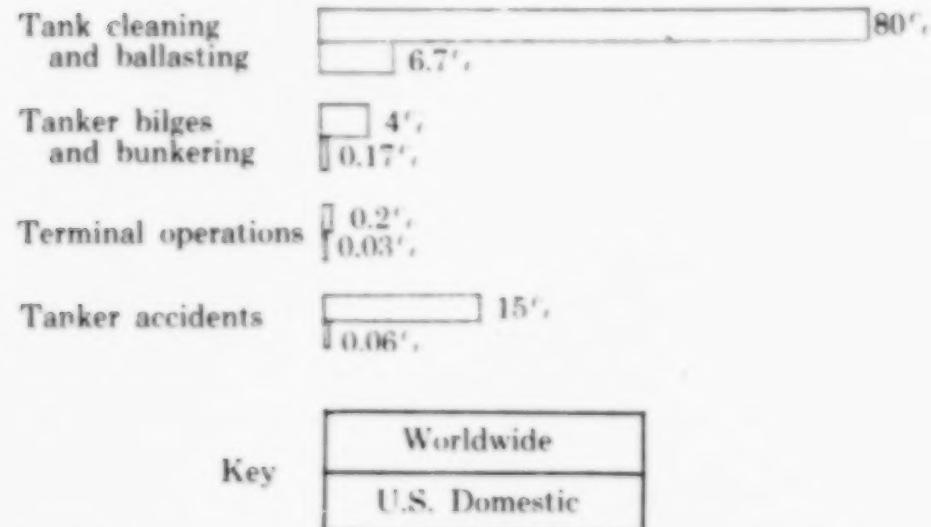


Figure 2. Sources of the estimated 1.35 million tons of oil entering the oceans each year from tankers. (Based on data in Table 4.)

The Marine Pollution Monitoring Pilot Project, part of the Integrated Global Ocean Station System (IGOSS) Program, sponsored by the United Nations' Intergovernmental Oceanographic Commission of UNESCO and the World Meteorological Organization, is also described in reference (9).

#### Tank Cleaning and Ballasting

Tank cleaning and ballasting accounts for approximately one million metric tons of the estimated six million tons of oil entering the marine environment from all sources each year. (Bilges contribute another 60,000 tons, terminal operations 3,000, and tanker accidents 200,000 — See Table 4.) The following description of tank cleaning and ballasting operations will help in understanding how this occurs.

After discharging cargo, a tank vessel without sufficient segregated ballast tanks will take some sea water aboard in her

cargo tanks to ensure proper propeller immersion and to provide handling and sea-keeping characteristics. The amount of ballast taken aboard depends upon the anticipated weather conditions, the distance and route of the ballast voyage, the vessel's lightship displacement (weight), length to depth ratio, and other vessel characteristics. The amount of ballast taken aboard generally varies from 20 to 50 percent of the vessel's total cargo carrying capacity, but may be greater during periods of severe bad weather.

The ballast that is put directly into cargo tanks immediately after cargo discharge comes into contact and mingle with the oil that adhered to the tank surfaces and remained below the suction bellmouths and in the piping after cargo discharge. This oily ballast must be disposed of in some way prior to arrival at the loading port unless the loading port has suitable reception capability. After disposal of the oily ballast, clean ballast suitable for direct disposal into the harbor at the loading port must be taken aboard. In the absence of segregated ballast tanks, empty cargo tanks must be washed to remove the residue oil and provide space for the clean ballast. These tank washings are pumped overboard and the clean tanks are filled with sea water which can be discharged into the harbor at the loading port. The number of tanks washed is a function of the particular vessel's proportions, the weather, the route, and the need to periodically clean tanks for internal inspection, repair at a shipyard, or to control sludge buildup. This generally amounts to between one-third and one-half of the vessel's tanks per ballast voyage. This operation is referred to in this section as "uncontrolled ballast discharge." It results in all of the oil residue from the cleaned tanks and approximately 15 percent of the oil residue from the tanks which were initially ballasted being pumped overboard. The amount of oil influx that results from this operation on any given voyage depends on the amount of oil that remains in the tanks after discharge at the unloading port. This number is commonly referred to as clingage. Clingage ranges from 0.1 percent to 0.9 percent of the cargo capacity depending on the type of oil, the stripping capability of the tanker, the particular cargo piping arrangement, and the internal structure of the tank vessel; it is considered to average 0.4 percent for crude oil.

All tank vessels do not pump the oil residue from their tank cleaning operations directly overboard. With the practice of the "load on top" (LOT) system, the tank cleaning residue (water and oil) is pumped into a holding tank. Here the mixture is allowed to settle and the water drawn off the bottom so that only oil and a small amount of water remains in the tank. These consolidated slops are then transferred to a reception facility or combined with the next cargo; hence, the term "load on top."

If all tank vessels employed a 100 percent efficient LOT system 100 percent of the time, tank cleaning and ballasting operations would not be a significant source of oil pollution. However, LOT is not being practiced by all tank vessels; where it is, it is estimated to be 90 percent efficient. This is because:

- a. the LOT system has not been used by tank vessels in the nonpersistent and special oil product trade. Reasons offered for not doing so are unwillingness to mix refined products with one another and problems associated with disposal of this type slop;
- b. certain ballast voyages can be so short as to preclude the time necessary for satisfactory operation of the LOT systems;
- c. depending on sea conditions, the necessary separation process may not be completely effective;
- d. the oil-water interface in the holding tank cannot be accurately determined and this results in a portion of the layer of oil being drawn off the water; and
- e. some components of oil are water soluble.

Oil from tank cleaning and ballasting represents about 80 percent of the oil entering the oceans from tankers; tanker bilges and bunkering, cargo handling spills, and tanker accidents are responsible for the other 20 percent.

#### **Tanker Bilges and Bunkering Spills**

The amount of oil lost to the sea from this source is difficult to support by means of measured data. The estimates in Table

4 come from reference (5) and are based on an assumed loss per ship of about 10 tons per year for machinery leakage and spills during bunkering.

### **Cargo Handling Spills**

The amount of oil lost to the water as a result of cargo handling spills depends on the number of cargo transfers and the measures taken to avoid such spills. The estimate of 3,000 tons per year from this source in Table 4 is taken from reference (5).

### **Tanker Accidents**

Tanker accidents are responsible for about 15 percent of the quantity oil inputs to the marine environment from tankers. But this input often occurs in a dramatic, concentrated, striking way. Because of this, accidental pollution has received more attention and public comment than some of the other sources. Estimates in Table 4 are based on references (1) and (4). Tanker accidents are discussed at greater length in Section (4) of this statement.

### **3.3 Effect of the Regulations on Tanker Oil Pollution**

#### **3.3.1. Requirements**

For purposes of analyzing their effect on oil pollution from tankers, the regulations discussed in Section 2.3 may be broken down into the following groups.

1. Segregated ballast (157.09)<sup>14</sup>
2. Cargo residue discharge standards and requirements for equipment to retain oily residues on board.  
Pumping, piping, and discharge arrangements (157.11)  
Designated area (157.13)  
Slop tanks in vessels (157.15)  
Cargo and ballast system information (157.23)

<sup>14</sup>The numbers in ( ) refer to specific regulations. Refer to reprint of the June 28, 1974, proposed rules contained in Appendix A starting on page 223.

Discharges; seagoing vessels of 150 gross tons or more (157.29)

Discharge of cargo residue (157.37)

Instruction Manual (157.49)

#### **3. Bilge discharge standards**

Oily residue tank (157.17)

Water ballast in oil fuel tanks (157.33)

Machinery space bilges (157.39)

#### **4. Cargo tank arrangement and size (157.19)**

#### **5. Subdivision and stability (157.21)**

#### **3.3.2. Factors Influencing Effects of Regulations**

The sea is a complex system and our knowledge of it is imperfect. Much remains to be learned before we can fully assess the impact of varying amounts of pollution of the sea by oil and answer the question, "At what level of petroleum hydrocarbon input to the ocean might we find irreversible damage occurring?"

(5) Because of this, it is not possible to say directly what effect these regulations will have on the environment. But action to control and reduce the amount of oil entering the marine environment is clearly prudent until uncertainties over fates and effects of oil are reduced. While the effect of the regulations on environmental quality cannot be assessed, estimates of the effect of the regulations on oil inputs from U.S. tankers can be made.

Figure 3 shows inputs to the process of estimating the effects of the regulations.

Some of these inputs are known or can be estimated (for example, the requirements of the regulations and oil inputs). In view of current economic conditions and energy conservation efforts, considerable uncertainty is involved in predicting amount and route of future oil transport and numbers and sizes of future new ships constructed.

Because of these uncertainties, no time-phased prediction of future effects is possible, but a reasonable idea of the effects can be obtained by determining the direction of change (reduction or addition to oil inputs) and estimating magnitude of effect from recent past experience.

#### **Estimated Effects**

These rules cover only U.S. vessels, so they will affect only oil inputs from U.S. vessels.<sup>15</sup>

While these rules are applicable only to vessels in domestic trade, the prospect of their extension to vessels in foreign trade and the benefits of standardized design and series production in ship construction mean that all new U.S. vessels will be built to these standards once they become effective, whether they are intended initially for foreign or domestic trade. Applicability of the various requirement groups to U.S. tankers is shown in Table 5.

It is obvious from Table 5 that some provisions of the regulations will start to take effect soon after they are adopted and others will be longer-term, influencing the amount of oil inputs as newer ships enter service and older ships are retired. Segregated ballast is an example of the latter. The problem of setting dates for the definition of "new vessel" is essentially one of balancing the need for regulations to take effect against the effect that short lead times will have on completed designs and existing contracts. In this case the Coast Guard feels that the previous notices have provided ample notification to industry of the impending regulations and that the dates selected are therefore not unreasonable.<sup>16</sup>

Requirements of Regulations  
segregated ballast  
cargo residue discharge standards  
bilge discharge standards  
cargo tank arrangement and size  
subdivision and stability

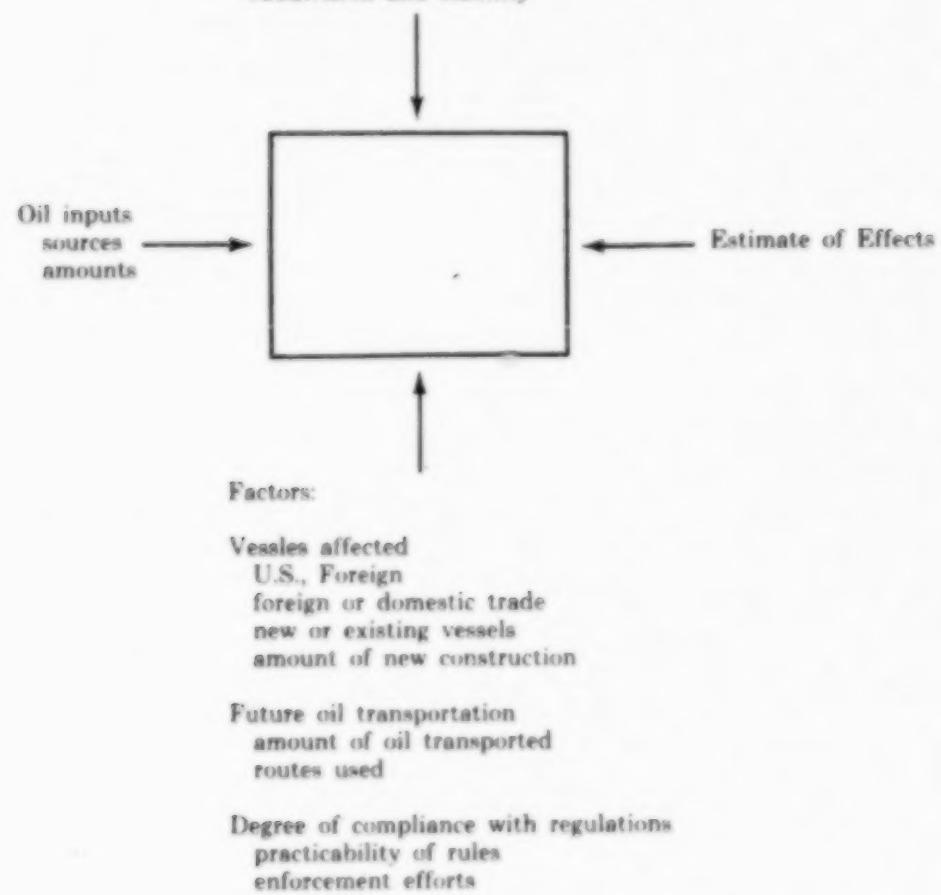


Figure 3. Inputs for estimating effects of regulations

<sup>15</sup>In order to comply with Title II of the Ports and Waterways Safety Act of 1972, similar rules will be made applicable to U.S. vessels in foreign trade and foreign vessels entering U.S. ports in 1976.

<sup>16</sup>The alternative of applying segregated ballast to existing vessels is discussed on pages 61-62.

TABLE 5. Applicability of Requirements to U.S. Tankers in Domestic Trade

Requirement		Existing Vessels	New Vessels <sup>1</sup>
Segregated ballast	157.09	No	Yes (over 70,000)
Cargo residue discharge standards Pumping, piping, & discharge arrangements	157.11	Yes	Yes
Designated area	157.13	No	Yes
Slop tanks in vessels	157.15	Yes	Yes
Cargo & ballast system information			
Discharges: seagoing vessels over 150 gross tons	157.29	Yes	Yes
Discharge of cargo residues	157.37	Yes	Yes
Bulge discharge standards	157.17	Yes (over 400 gross tons by 1/1/77)	Yes (over 400 gross tons)
Oily residue tank	157.33	No	Yes
Water ballast in oil fuel tanks	157.39	Yes	Yes
Machinery space bilges	157.19	Some <sup>2</sup>	Yes
Cargo tank arrangement and size	157.21	No <sup>3</sup>	Yes
Subdivision and stability			

<sup>1</sup> New vessels" are vessels whose construction is contracted for after June 30, 1975.<sup>2</sup> This regulation applies to vessels whose construction was contracted for after January 1, 1972.<sup>3</sup> Tankers built in the United States since 1968 have met these requirements.

## Exhibit X

## Exhibit X

Segregated ballast on new tank vessels greater than 70,000 DWT should practically eliminate oil inputs from tanker ballasting and associated tank washing for clean ballast from these vessels. The full effect will depend on future U.S. ship construction. As Table 4 shows, segregated ballast offers the potential of much more significant savings worldwide when segregated ballast standards are adopted by other countries.

The cargo residue discharge standards, which are applicable immediately to all existing U.S. tankers in domestic trade as well as to new tankers, will significantly reduce inputs from all of the tank cleaning and ballasting sources listed in Table 4. The regulations apply to oil in any form including non-persistent oils and prohibit any discharge of oily mixtures from cargo residues within 50 miles of land.

The effect of the regulations will be to require that existing vessels and new vessels be equipped to utilize the improved LOT system.<sup>16a</sup> Vessels which presently utilize LOT will have to upgrade to an improved method, one with better monitoring and control techniques. Vessels which do not presently use LOT will have to:

- a. use improved LOT during a ballast voyage retaining on board that which cannot be discharged
- b. transfer residues to a reception facility

To get some idea of the effect of these requirements on oil inputs, if U.S. vessels, tankships in domestic trade used improved LOT, discharging the maximum allowable 1/15,000 of their cargo over 50 miles from land, oil inputs for the quantities transported in 1972 would be as shown in Table 6.

The realization of the reductions in Table 6 depends on (1) availability of shoreside facilities for reception of cargo residues where they cannot or are not mixed with next cargo and dirty ballast tank washings where LOT techniques cannot be used, (2)

<sup>16a</sup>LOT refers to "load-on-top." See page 39 for a description of LOT operations.

installation and use of oil content monitors and interface detectors to make LOT operations more effective, and (3) enforcement of the discharge standards.

**TABLE 6. Comparison of Oil Inputs from Tank Cleaning and Ballasting U.S. Tankships in Domestic Trade**

<b>Source</b>	<b>Amounts Presently Permitted versus New Discharge Standard</b>	
	<b>Present (Table 4)</b>	<b>Estimated Amount (Thousands of Metric Tons)</b>
	<b>Permitted by Discharge Standards</b>	
Ballasting and tank washing for clean ballast, crude and residual	24	4.1
Tank cleaning for sediment control, crude and residual	16	—
Tank cleaning, refined product carriers for clean ballast and cargo purity	43	5.3
Tank cleaning prior to shipyard repairs	7.2	0.3
<b>TOTALS</b>	<b>90.2</b>	<b>9.7</b>

Increased retention of dirty ballast and tank washings where cargoes not amenable to LOT procedures are transported, will increase the need for shoreside oily residue reception facilities. A number of questions on the availability and environmental effects of shore reception facilities to take care of oily ballast, tank cleaning residue, and oily bilge water currently dumped at sea need to be answered:

Are adequate reception facilities available?

How will additional required reception facilities be provided?

Can these facilities be provided and wastes disposed of in an environmentally sound fashion?

The Coast Guard is working now with other government agencies and appropriate segments of the marine industry to assemble and update information on the adequacy of reception facilities. Some information on existing reception facilities is available (10), and an additional survey of such facilities at terminals in the U.S. is being conducted. The requirement for additional reception facilities will depend on numbers and routes of ships entering loading ports, and the U.S. is fortunate, in this case, to be an importer rather than an exporter of crude oil. Reception facility design and capacity will also depend on the type of oil and amount left on board after cargo discharge. A study conducted by Exxon before the 1973 Marine Pollution Convention (11) and on EPA study on clean products (12), represent the major works in this area.

If additional facilities are required, they will presumably be provided by terminal operators, port authorities, or ship repair yards. Limitations on trade into a port or other restrictions may have to be made to induce terminals, port authorities, or shipyards to invest in the necessary facilities.

Experience with present facilities seems to indicate that waste waters can be satisfactorily treated, although additional improvements in treatment plants will probably be required as states and local jurisdictions upgrade their discharge standards.

Load-on-top (LOT) procedures have been used by many of the world's tanker operators for a number of years. Their effectiveness depends on careful stripping and flushing of cargo tanks and lines, careful sounding of slop tanks to locate the oil/water interface, and close visual observation of the overboard discharge to determine when discharge should be stopped. The discharge criteria contained in the regulations and the 1973 Marine Pollution Convention are based on results achievable with somewhat improved LOT methods. More careful attention to slop tank and piping design and use of instruments to more accurately determine oil content of overboard discharges and location of oil/water interface in slop tanks improve the effectiveness of the

LOT techniques that have been used in the past. They make it easier to do a better job.

At least one oil content monitoring device suitable for use on tankers is commercially available and has been installed on a number of ships. The Convention requires oil content monitors and interface detectors be approved by the national administration (by the U.S. Coast Guard in our case) and the Coast Guard is developing specifications for monitors, interface detectors, and oily water separators which will be published for public comment as rapidly as possible. It is not possible to give a firm date for publication of regulations on this equipment. Work has been underway over the past year on development of test specifications and steps to provide equipment test facilities. The Coast Guard has been working with appropriate facets of the U.S. Marine industry and other government agencies and also with the Marine Environmental Protection Committee of IMCO. The Coast Guard feels that regulations must be based on facts and that developing and carefully testing good specifications is essential. Once specifications have been published and devices tested and approved, an assessment can be made as to a reasonable deadline for mandatory installation and use of the equipment. While oil content monitors and interface detectors will make LOT easier and more effective, the improvement is small compared to the much larger improvement resulting from a tanker operator's commitment to use LOT methods at all. It is important therefore to go ahead with regulations establishing discharge criteria which require that LOT (or more properly, retention-on-board) techniques be used.

The effectiveness of LOT techniques depends largely on the training and dedication of the shipboard operator. Enforcement of the standards will depend on oil record book entries, oil content monitor traces, audits of slops delivered to terminals and aerial surveillance. Under the 1961 Act, it is possible for oil record books to be falsified. The proposed regulations should help cure this problem, as oil record book entries can be tied to ship's navigation position. The expanded oil record book will account for all oil received, discharged and internally transferred. Greater specificity

of information entered and tank-by-tank information requirements will greatly facilitate efforts in detecting violations of the regulations.

The *bilge discharge standards* allow oily mixtures from machinery space bilges containing up to 100 ppm of oil to be discharged outside of 12 miles from shore. Laws already in effect require that discharges within 12 miles of land must not leave a visible sheen. Discharges must be made through an oily water separator or an oil discharge monitoring and control system which records the oil content and automatically stops the discharge if allowable oil content is exceeded.<sup>17</sup> Oily ballast from fuel tanks of existing tank vessels must be similarly treated; new vessels may not ballast fuel tanks. These standards will reduce oil inputs from tanker bilges and bunkers, but how much is hard to say because of the number of variables involved in bilge accumulation and oil content. There will be an increased need for shore disposal and oil reprocessing facilities where waste oil, purifier sludge, etc. cannot be reused on the vessels.

*Cargo tank arrangement and size:* Another provision included in the regulations relates to the arrangements of vessel tanks and limitations of tank size for new tank vessels and some existing tank vessels. The objectives of these provisions are to place an upper limit on the quantity of oil which can escape into the sea as a result of collision, grounding or other vessel casualty. Certain ships even now under construction would have to comply with the tank arrangement and size limitations. That provision would apply to tank vessels presently under construction which will be completed after January 1, 1977, and to vessels completed before this date but which were started after January 1, 1972.

The regulation is written assuming damage conditions for both collision and grounding situations. These values represent severe assumed injuries in such accidents and are to be used to

<sup>17</sup>The Coast Guard has not yet proposed specifications for either of these items. The discussion of oil content monitors and oily water separators discussed under the heading, *cargo residue discharge standards* above, applies to these items also.

determine, by trial at all conceivable locations, the worst combination of compartments which would be breached by such an accident. The consequence of these injuries should not exceed the hypothetical outflow limits mentioned earlier, thereby providing criteria for vessel design and encouraging use of double bottoms, double sides, void spaces and segregated ballast.

The effect of *cargo tank arrangement and size* is largely one of reducing the potential size of future outflows due to tanker accidents from what might have resulted if the trend toward larger individual tanks had been allowed to continue.

The effect of *subdivision and stability* requirements on oil outflows also depends on the number of new ships entering service. These requirements will improve the ability of tankers to remain afloat after flooding of cargo or machinery spaces:

Vessels over 225 meters long (738 feet, approximately 50,000 DWT)	Must be able to survive flooding of any two adjacent compartments
Between 225 meters and 150 meters (492 feet, approximately 13,000 DWT)	Flooding of machinery space or any two other adjacent compartments
Less than 150 meters	Flooding of any single compartment other than machinery

These measures will decrease risk of accidental outflow from collisions and flooding of machinery space by increasing survivability of new vessels. For example, of the 47 tankers, over 10,000 DWT lost at sea during the period 1969-1973, six of the losses involved flooding of the machinery space. The circumstances in these cases are such that it appears the new subdivision and damage stability requirements could have prevented loss of these ships and resulting oil outflow.<sup>18</sup>

Table 7 summarizes the expected effects of these regulations on the oil inputs from U.S. tankers. The cargo discharge residue standards contribute the bulk of the reduction — an estimated 80,000 metric tons per year.

<sup>18</sup>These losses are: ANASTASIA J.L., GEZINA BROVIG, ALKIS, GIUSEPPE GIULI, PLOIESTI, and the TRADER.

TABLE 7. Expected Effects of Regulations on Oil Inputs to the Sea from U.S. Tankers

	Cargo Residue Discharge Standards	Bilge Discharge Standards	Cargo Tank Arrangement and Size Standards	Subdivision and Stability
Segregated Ballast				
Tank cleaning and ballasting	decrease significantly for all vessels	decrease for all vessels	decrease for all vessels	decrease for all vessels
Ballasting and deballasting and associated tank cleaning	decrease for new vessels over 70,000 DWT	decrease for all vessels	decrease for all vessels	decrease for all vessels
Tank cleaning for sediment control crude oil	—	—	—	—
Tank cleaning of refined product tanker for ballast and for cargo purity	—	—	—	—
Tank cleaning prior to shipyard repairs	—	—	—	—
Tanker bilges and bunkering	—	—	—	decrease for all vessels
Terminal operations	—	—	—	—

\*Amounts shown are the reduction of annual oil input in thousands of metric tons based on Table 6.

TABLE 7. (Cont.) Expected Effects of Regulations on Oil Inputs to the Sea from U.S.

	Tankers	Cargo Residue Discharge Standards	Bilge Discharge Standards	Cargo Tank Arrangement and Size	Subdivision and Stability
	Segregated Ballast				
Tanker Accidents	—	—	—	small decrease	decrease
Breakdowns	—	—	—	decrease	decrease
Collisions	decrease	decrease	—	decrease	—
Explosions	—	(less tank cleaning)	—	—	—
Fires	—	—	—	unknown	decrease
Groundings	decrease	—	—	—	decrease
Ramming	decrease	—	—	—	—
Structural Failures	unknown	—	—	—	—
Other	—	—	—	—	—

Exhibit X

Exhibit X

### 3.4 Other Impacts of the Regulations

The economic impact, technical feasibility, and safety impact of the regulations are discussed in this section.

#### Economic Impact

The regulations require a number of actions be taken by shipowners and operators in an effort to reduce oil inputs to the oceans. These actions will require additional capital investment in vessels and equipment and increase operating costs. These increased costs will ultimately be passed on to the consumer as increased transportation costs and higher prices for petroleum products. The actions required by the regulations are shown in Table 8.

The largest cost associated with these regulations is the increase in construction cost to provide segregated ballast space on new tankers over 70,000 deadweight tons. Various estimates of cost increases to provide segregated ballast have been made. A study submitted by the United States to IMCO prior to the 1973 Pollution Conference estimated the increase in required freight rate to range from about 4 percent to as much as 10 percent, depending on ship size, voyage length, how the ballast was distributed (staggered wing, double bottom, double skin, etc.), and a host of other variables.<sup>19</sup> It should be noted that these costs are representative, but not necessarily optimum (no effort was made to optimize individual designs since the study was done to compare various segregated ballast designs) and depend on a great many assumptions involving some uncertainty.

Required freight rate depends on vessel size and length of voyage. Some typical rates, their contribution to oil prices and the effect of a 10-percent increase in required freight rate are shown in Table 9.

<sup>19</sup>Required freight rate (RFR) is commonly used as a measure of vessel profitability. It is defined as the income, per unit of cargo, that a shipowner must collect in order to earn returns equivalent to the repayment of his investment plus some arbitrary (but reasonable) rate of interest. (Reference 24) RFR takes into account amortization of capital costs as well as operating costs. See Table 7 of Reference 13, Part 1 and page xi of Part 2, for additional background on increase in RFR due to additional construction cost of segregated ballast.

TABLE 8. Action Required by Regulations

Requirement	Existing Vessels	New Vessels
Segregated ballast tanks	Not required	For vessels over 70,000 DWT, increasing size of ship by approximately 20% for same payload results in construction and operating cost increases. Additional pump and piping for segregated ballast system Additional design cost to locate segregated ballast
Cargo residue discharge standards Pumping, piping and discharge arrangements	Install new discharge line	Install new discharge line
Designated area	Not required	Located area so overboard discharge can be observed Install pump shutoff control
Slop tanks	Designate slop tank, modify piping by December 31, 1977	Design and install slop tank system

Exhibit X

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TABLE 8. (Con't.) Action Required by Regulations

Requirement	Existing Vessels	New Vessels
Cargo and ballast system information	Prepare information	Prepare information
Discharge of cargo residue	Install oil discharge monitoring and control system. Use LOT procedures.	Install oil discharge monitoring and control system. Use LOT procedures Dispose of slops ashore Cost of reception facilities Delay in port to discharge slops Additional time at sea for LOT
Hull discharge standards Oil residue tank	Install tank Alter piping	Install tank and piping Oil discharge monitoring and control system or oily water separating equipment
Machinery space bilges		Not required
Cargo tank arrangement and size		Additional design calculations Restrict tank size
Subdivision and stability		Additional design calculations

Exhibit X

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In addition to increasing the cost of new tanker construction, the regulations will require installation of monitoring and control equipment and piping changes to both new and existing vessels at an estimated cost of \$200,000 per vessel. This is, of course, small compared to the increased construction costs discussed above (say 5 percent increase on a \$30 million ship, or \$1.5 million) so its effect on costs will also be small.

Another requirement that will raise transportation costs which is not included in Table 9, is shore reception facilities.

**TABLE 9. Typical Transportation Costs for Tanker Oil Shipments**

Voyage	Venezuela-U.S. East Coast	Persian Gulf-U.S. East Coast
Ship	20,000 DWT	150,000 DWT
Approximate Required Freight Rate (RFR)	\$0.32/bbl	\$0.70/bbl
Assumed Cost of Crude Oil	\$12/bbl	\$12/bbl
% of Cost represented by Ocean Transportation	2.7%	5.8%
Maximum Estimated % Increase in RFR <sup>19*</sup>	10%	10%
\$ Increase in RFR (Price Increase required to cover increased transportation cost)	\$0.03/bbl (0.07 cents/gal)	\$0.07/bbl (0.17 cents/gal)

<sup>19\*</sup>See page 53 for discussion of range of estimates for increased RFR and factors influencing RFR.

In addition, there will likely be some additional costs for enforcement of the new standards by the Coast Guard. Some additional plan review and inspection will be required. Vessel boarding and aerial surveillance may be required to provide effective enforcement of the discharge standards.

### Technical Feasibility

The achievement of the discharge standards in the regulations, the same standards as those in the 1973 Marine Pollution Convention, is considered technically feasible. Improvements in the oil content monitors now available, particularly for refined products, are needed to improve separation of oil from water on board ships to optimum levels, but these improvements are not necessary to achieve the bulk of the possible improvement.

### Safety Impact

The regulations, directed at pollution control, will also have safety benefits. Segregated ballast on ships over 70,000 DWT will give additional protection from damage from collisions and groundings (and fires which sometimes occur as a result). Subdivision and stability requirements will contribute to survivability of new tankers after damage also.

The piping system requirements and segregated ballast distribution requirements will increase complexity of tankers and may make proper inspection and repair of tank interiors more difficult. The Coast Guard does not feel these potential problems are serious enough to warrant rejecting these requirements.

## 4. ALTERNATIVES TO THE PROPOSED ACTION AND FUTURE ACTIONS PLANNED BY THE COAST GUARD

### 4.1 Introduction

Title II of the Ports and Waterways Safety Act of 1972, which amended the Tank Vessel Act (46 U.S.C. 391a), states in Section 201(7)(A):

"The Secretary shall begin publication as soon as practicable of proposed rules and regulations setting forth minimum standards of design, construction, alteration, and repair of the vessels to which this section applies for the purpose of protecting the marine environment. Such rules and

regulations shall, to the extent possible, include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities."

Congress thus directed that rules be developed in three areas:

- a. standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident;
- b. standards to reduce cargo loss following collision, grounding, or other accident; and
- c. standards to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling and other activities.

It has not been possible for the Coast Guard to develop rules comprehensively covering all of these problems in the time period since the Ports and Waterways Safety Act became law. The rules for tank vessels in domestic trade, constituting a first step toward the body of rules and regulations that will ultimately be required to fully implement the Act, concentrate primarily on the third area listed above and also contain some significant measures affecting the second area. There are two reasons for this emphasis: operational pollution accounts for 80 percent of the oil inputs to the oceans from tankers, and international standards which will greatly reduce operational pollution, as well as contribute significantly to the reduction of accidental oil outflows, have been elaborated and proposed for worldwide adoption in the 1973 Marine Pollution Convention.

The alternatives to the proposed action in this case are other forms the regulations might have taken—requirements that might have been omitted, added, or changed. The basis for comparison of these alternatives is the rules described in Section 2, the environmental impact of which is assessed in Section 3. These rules are based on the standards contained in the 1973 Marine Pollution Convention.

#### **4.2 Summary of Alternatives Considered**

Here is a list of the alternatives considered. (The reasons why these alternatives were not adopted are discussed on the following pages):

- A. Publish no additional regulations. (No Action)
- B. Publish regulations less stringent than those proposed. These could include:
  1. Less strict discharge criteria which would allow more oil to be discharged overboard from tank cleaning and ballasting operations.
  2. Discharge restrictions allowing discharges into waters less than 50 miles from U.S. coastlines.
  3. Regulations not requiring segregated ballast on new tankers over 70,000 DWT.
- C. Publish regulations more stringent than those proposed. These could include:
  1. Regulations prohibiting any discharge of oily mixtures to the sea.
  2. Regulations allowing oily mixtures to be discharged but limiting the concentration and total amount of oil discharged to quantities smaller than those in the proposed rules.
  3. Regulations requiring segregated ballast
    - a. on tankers smaller than 70,000 DWT
    - b. on existing tankers
    - c. be located so as to reduce cargo loss following collision, grounding, or other accident (specifically, in double bottoms).
  4. Regulations requiring double bottoms.
  5. Regulations requiring smaller tank size limits.
  6. Regulations requiring various construction features and equipment intended to improve vessel maneuvering and stopping ability. These include:
    - a. increased astern horsepower (greater backing power)
    - b. twin screws and twin rudders
    - c. controllable pitch propellert(s)
    - d. bow thruster, or bow and stern thrusters

- e. more rudder area
- f. faster rudder turning rate
- g. flapped rudder
- h. rotating cylinder rudder
- i. auxiliary braking devices (flaps, parachutes, etc.)
- 7. Regulations similar to those contained in the June 28, 1974, advance notice of proposed rulemaking on Marine Traffic Requirements, including regulations on navigation equipment.
- 8. Regulations requiring cargo tank inerting systems.
- 9. Regulations requiring posting of vessel maneuvering information in the pilothouse of all vessels.
- 10. Regulations requiring improved radar training for ship's officers.
- 11. Regulations setting improved standards for training and watchkeeping.
- D. Reduction of oil consumption or reduction of oil imports.
- E. Use of a different mode of transportation for oil.

#### **4.3 Reasons Why Alternatives Were Rejected**

The alternative of issuing no additional regulations was rejected since Title II of the Ports and Waterways Safety Act requires the Coast Guard to publish proposed rules and regulations for minimum standards of tank vessel design, construction, alteration and repair for the purpose of protecting the marine environment. In addition, failure to issue rules would be inconsistent with the position the United States took at the 1973 Marine Pollution Conference and the provisions of the resulting international agreement.

The second alternative, that of publishing regulations less stringent than those that have been proposed, includes several sub-alternatives:

1. Less strict discharge criteria which would allow more oil to be discharged overboard from tank cleaning and ballasting operations,

2. Discharge restrictions allowing discharges of oily mixtures into waters less than 50 miles from U.S. coastlines, and
3. Regulations not requiring segregated ballast on new tankers over 70,000 DWT.

These sub-alternatives and, indeed, all courses of action involving regulations less stringent than the proposed regulations and the standards contained in the 1973 Marine Pollution Convention (which the proposed regulations embody), have been rejected for the following reasons:

They are inconsistent with the standards contained in the 1973 Marine Pollution Convention; they are less desirable from an environmental viewpoint since they would not restrict the amount of oil entering the world's oceans to as great an extent as the proposed rules; and technology is available to do better in terms of reduction of oil inputs from operational sources (*i.e.*, higher standards are practicable in terms of cost and technical feasibility).

The need for regulations applicable to U.S. tankers in domestic trade to be consistent with the 1973 Marine Pollution Convention is discussed on pages 4-10 of this environmental impact statement. The matter of setting discharge criteria is discussed further in the following paragraphs on more stringent regulations. No detailed assessment of added environmental damage which might result from regulations allowing discharges within 50 miles of U.S. coastlines (but outside U.S. territorial waters) has been made, but the Coast Guard believes that the validity of prohibiting discharges from tanker cargo spaces into waters of this zone is adequately supported by previous international agreements. Segregated ballast was recognized by the 1973 Marine Pollution Conference as an effective means of reducing the amount of oily mixtures created as a result of tank ballasting, particularly on crude oil carriers which make up the leet of ships over 70,000 DWT.

#### **More Stringent Regulations**

The alternative of publishing regulations more stringent than those proposed is the most complicated of all the alternatives

considered because of all the possible features or measures which might have been included in the regulations. A number of the sub-alternatives considered have been rejected for purposes of this rulemaking, but will probably be included in the full body of the rules and regulations that will ultimately be required to fully implement the Ports and Waterways Safety Act of 1972. Some of these features or measures have already started through the rulemaking process and others are still under development by the Coast Guard. Reasons for the rejection of these features or measures for purposes of this rulemaking are discussed in the following paragraphs, with cross-references to additional discussion elsewhere in this impact statement where necessary.

#### **Prohibit Any Discharge of An Oily Mixture**

In order to reduce operational outflows, regulations prohibiting any discharge of an oily mixture to the sea from a tank vessel's cargo spaces might be published. This prohibition might be achieved by requiring tank vessels to:

- a. wash tanks at the unloading point and transfer the tank washings to a reception facility prior to taking on clean ballast for the return voyage; or
- b. retain all dirty ballast and tank washings on board the vessel and then transfer them to a reception facility; or
- c. carry segregated ballast and retain on board all tank washings, dirty ballast from fuel oil tanks, and bilge water containing lubricating and fuel oil drained or leaked from machinery until they can be transferred to a reception facility.

The concept of a total prohibition against discharges of oily mixtures into the sea and these means of achieving such a goal have been rejected for the following reasons: it is inconsistent with the standards established by the 1973 Marine Pollution Convention; it would create greater shore reception facility problems than we already have with the proposed regulations; it would involve additional time delays for tankers; and it sets a standard that will be impractical for application to vessels other than tankers.

The need for regulations applicable to U.S. tankers in domestic trade to be consistent with the standards established by the 1973 Marine Pollution Convention is discussed on pages 4-10 of this environmental impact statement.

The proposed regulations will increase the need for shoreside oily residue reception and treatment facilities, particularly where cargoes not amenable to load-on-top procedures are being transported. Questions concerning the availability and environmental effects of shore reception facilities are discussed on page 47. The procedures involving washing tanks prior to departure and retaining all dirty ballast until end of voyage, procedures a. and b. above, would greatly increase the need for shore reception facilities, since much larger amounts of washwater and dirty ballast would have to be treated. Both of these alternatives would, then, only make an already serious situation worse.

Neglecting delays due to port congestion around reception facilities, procedures a. and b. would also involve additional vessel voyage time—about 10 percent more for a., and a slightly smaller amount for b. These delays would be reflected in increased costs and numbers of ships needed to provide the same throughout capacity.

If regulations prohibiting the discharge of an oily mixture to the sea from tank vessels were published, then this same restriction would, in the Coast Guard's view, have to be applied to all other seagoing vessels. (Note that the requirements of the 1973 Marine Pollution Convention apply to all vessels, not just tank vessels. Also, refer to pages 8-9 for a discussion of grounds for making distinctions in the regulations applicable to particular classes or groups of vessels.) All bilge water would then have to be retained on board for disposal at a shoreside reception facility. This would not present a serious problem on tank vessels where tankage used for cargo slops could probably also accommodate bilge water generated, but other types of vessels would be required to install large storage tanks at substantial cost. A requirement to provide storage tanks for all of a ship's bilge water is both impractical and unnecessary in the Coast Guard's view.

Although prohibiting any discharge of oily mixtures, or a "zero discharge standard" as it is sometimes called, has been rejected as an alternative for purposes of these regulations applicable to all tank vessels in domestic trade, such a standard will be applied to vessels loading oil at the Alaska pipeline terminal at Valdez. The permit agreement between the Department of the Interior and Alyeska Pipeline Corporation stipulates that ships loading there will discharge all oily residues ashore and that shore reception facilities will be provided. This satisfies demands for such a standard on this trade without influencing international acceptance of the Marine Pollution Convention due to unilateral U.S. action.

#### **Allow Some Discharge But Not As Much As Proposed**

Another possibility for reducing operational outflow from levels permitted by the proposed regulations would be to publish regulations allowing oily mixtures to be discharged, but limiting the concentration and total amounts of oil discharged to quantities smaller than those in the proposed rules. This alternative has been rejected for the following reasons: Such action is not consistent with the standards of the 1973 Marine Pollution Convention; it involves significant problems in arriving at permissible discharge quantities; it is not practical at the present stage of technological development; and it would involve considerable time delay while improved shipboard separation and monitoring techniques were developed.

The need for regulations applicable to U.S. tankers in domestic trade to be consistent with the standards established by the 1973 Marine Pollution Convention is discussed on pages 4-10 of this environmental impact statement.

The discharge criteria contained in the proposed regulations are identical to those in the 1973 Marine Pollution Convention. The values set by the Conference represent consensus of expert opinion, based on shipboard tests, of results that can be achieved by diligent use of load-on-top techniques with the separation and monitoring techniques currently available. At a discharge rate of

60 liters of oil per mile, whatever sheen is created by oil on the water disappears a short distance behind the ship. Oil-in-water concentrations left in the wake of a ship discharging such a mixture at least 50 miles offshore are well below the levels at which environmental damage has been observed. (See conclusions of NAS report *Petroleum in the Marine Environment* starting on page 235 of this impact statement.) The discharge criteria set forth in the regulations represent the most effective pollution control performance standard achievable with load-on-top techniques presently available.

It would be much more satisfying if, as the Center for Law and Social Policy suggested in commenting on the draft EIS, any damage to the marine environment produced at a 60 liters per mile discharge rate could be set forth and assessed and discharge criteria established on the basis of (a) conclusive evidence showing it is not technologically feasible to reduce discharges below these levels and (b) conclusive evidence that discharges at such levels are not harmful to the marine environment.<sup>106</sup> Unfortunately, as with many other environmental issues, conclusive evidence is not available and decisions must be made in the face of some uncertainty. Work done in preparation for the 1973 Marine Pollution Conference and deliberations at the Conference support the belief that the discharge criteria in the Convention and the proposed regulations represent the limits of what is technologically feasible today and in the near future. The report, *Petroleum in the Marine Environment* (reference 5), supports the belief that discharges at the 60 liters per mile level will not significantly damage the marine environment. But in both cases the evidence is far from "conclusive."

In view of this, the Coast Guard rejects as impractical the notion of setting discharge criteria for purposes of these regulations which are more stringent than those in the 1973 Marine Pollution Convention. The Coast Guard also considers a total prohibition against any discharge of an oily mixture to be equally impractical.

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<sup>106</sup>See pages 148, 176, and 177 of this impact statement.

**Additional Requirements for Segregated Ballast**

The Coast Guard adopted for purposes of these regulations a requirement for segregated ballast on new tankers over 70,000 DWT. Several additional segregated ballast measures were considered and rejected. These measures are: requiring segregated ballast on new tankers smaller than 70,000 DWT (in addition to requiring it on new tankers over 70,000 DWT as the proposed regulations do); requiring existing tankers be modified to provide segregated ballast spaces; and requiring that segregated ballast be located so as to reduce cargo loss following collision, grounding or other accident (and, specifically, in double bottoms).

The first of these, requiring segregated ballast on tankers smaller than 70,000 DWT, has been rejected because it is not included in the standards contained in the 1973 Marine Pollution Convention, and because it would not be an effective pollution prevention measure on smaller tank vessels because most of these vessels carry petroleum products rather than crude oil and must wash tanks for cargo purity reasons rather than to provide space for clean ballast.

The need for regulations applicable to U.S. tankers in domestic trade to be consistent with the standards established by the 1973 Marine Pollution Convention is discussed on pages 4-10 of this environmental impact statement.

Tankers clean cargo tanks for several reasons:

- a. to provide space for clean ballast,
- b. to remove sediment deposited by previous cargoes,
- c. to prepare a tank for loading where maintaining the purity of the next cargo is very important, and
- d. to make a tank safe for internal inspection and repair work.

Segregated ballast will eliminate the need to wash cargo tanks to provide space for clean ballast, but it does not affect the need

to clean tanks for the other purposes mentioned above. All tankers have to clean tanks periodically for internal inspection and repairs. Crude oil carriers have to do some cleaning to control sediment buildup, but generally they do not have to worry about cleaning to insure purity of the next cargo. Most product carriers are forced to clean all of their tanks on the ballast leg of each voyage to insure their next cargo is not contaminated by remnants of their last cargo. While segregated ballast will have a significant impact on operational outflows from crude oil carriers (most of which are larger than 70,000 DWT), it would not significantly reduce the amount of tank cleaning and the resulting operational outflows from produce carriers (all of which are under 70,000 DWT) since the oily mixtures are created by cargo purity washing needs, rather than clean ballast considerations.

The second segregated ballast measure, requiring existing tankers be modified to provide segregated ballast spaces, has been rejected for purposes of this rulemaking on the following grounds: It is not required by international standards contained in the 1973 Marine Pollution Convention; it must be done on a worldwide basis if adverse effects on the competitive standing of U.S. vessels are to be avoided; and there is a higher priority need to get the principle of segregated ballast for new vessels accepted worldwide before trying to extend segregated ballast requirements to existing vessels. The need for regulations applicable to U.S. tankers in domestic trade to be consistent with the standards established by the 1973 Marine Pollution Convention is discussed on pages 4-10 of this environmental impact statement. At this point, the Coast Guard's greatest concern is to get the Convention requirement for segregated ballast on new vessels accepted internationally and into force. Once that goal is realized, consideration can be given to extending segregated ballast requirements to existing vessels.

The third segregated ballast measure, requiring that segregated ballast be located so as to reduce cargo loss following collision, grounding, or other accident (and, specifically, in double bottoms), has been at least partially incorporated into the final rules, although double bottoms are not required. Requirements for location of segregated ballast are discussed on page 19 and in

Appendix C, starting on page 241. The alternative of specifically requiring double bottoms is discussed in the following paragraphs.

#### **Measures to Reduce Accidents and Cargo Loss Following Accidents**

As noted on page 58, it has not been possible to develop a comprehensive set of rules covering all aspects of the problem of oil pollution from tankers in the period since the Ports and Waterways Safety Act became law. The proposed rules, the first step toward full implementation of the Act, concentrate primarily on operational pollution because 80 percent of the oil inputs to the oceans from tankers result from routine operations, and because international standards which will greatly reduce operational pollution have been elaborated and proposed for worldwide adoption. On the other hand, the problem of accidental pollution, which has received much more public attention, accounts for only 15 percent of oil inputs from tankers but is more difficult to solve. The remaining measures to be discussed as part of the alternative of publishing regulations more stringent than those proposed have to do with standards proposed to reduce the possibility of an accident or to reduce cargo loss following an accident.

Before one can evaluate the effectiveness of various measures intended to avoid accidents or to mitigate the resulting oil outflows, it is necessary to have a basic understanding of the tanker accident phenomenon and the factors influencing accident occurrence and effects. The discussion on pages 62-81 provides background on tanker accidents and many of the vessel equipment and features discussed in the following paragraphs. The reader should refer to the expanded discussion where indicated.

#### **Double Bottoms<sup>19c</sup>**

A requirement that new U.S. tank vessels intended for use in domestic trade be constructed with a double bottom within the cargo space has been rejected for purposes of these regulations

<sup>19c</sup>For a description of a double bottom and discussion of why they are used on various types of ships refer to page 196 of this EIS.

for the following reasons: Such a requirement is not included in the 1973 Marine Pollution Convention, and double bottoms would be ineffective in reducing cargo loss during accidents other than groundings. The need for regulations applicable to U.S. tankers in domestic trade to be consistent with the standards contained in the 1973 Marine Pollution Convention is discussed on pages 4-10 of this environmental impact statement. Frequency and seriousness of various types of accidents, and double bottom cost, effectiveness, and disadvantages are discussed on pages 72-77. No particular type of vessel damage so dominates accidental outflow that a single design solution should, in the Coast Guard's view, be stipulated by law or regulation.

#### **Smaller Tank Size Limits**

A requirement that new U.S. tank vessels intended for use in domestic trade be built with tank size limits smaller than those included in the proposed rules (described on page 21) was rejected for the following reasons: Such a requirement would not be consistent with the international standards in the 1973 Marine Pollution Convention; any reduction in accidental outflow achieved would be offset by increased operational pollution; and piping system complexity, vessel cost, chances of overfilling of tanks, and vessel loading times would all be increased. The need for regulations applicable to U.S. tank vessels in domestic trade to be consistent with the requirements of the 1973 Marine Pollution Convention is discussed on pages 4-10. The increase of operational pollution due to increased tank surface area and effects of increased piping system complexity, vessel cost, risk of overfilling, and vessel loading times are discussed on page 77.

#### **Improvements in Maneuvering and Stopping Ability**

Requirements for various construction features and equipment intended to improve vessel maneuvering and stopping ability (and thus reduce the possibility of an accident) have been rejected as part of these proposed regulations for the following reasons: Such requirements are not included in the international standards in the 1973 Marine Pollution Convention; there are unresolved questions concerning their effectiveness in reducing

accidents which must be cleared up before regulations are published; and the features and equipment available improve maneuvering and stopping ability of large tankers only marginally. The need for regulations applicable to U.S. tank vessels in domestic trade to be consistent with the requirements of the 1973 Marine Pollution Convention is discussed on pages 4-10. Effectiveness of various construction features and equipment in improving maneuvering and stopping ability and in reducing accidents is discussed on pages 64-71. The primary reason for rejecting these requirements is the absence of any evidence that the improvements in maneuvering and stopping ability which these features and equipment would provide for large tankers would materially reduce the possibility of collision, grounding, or other accident.

#### **Marine Traffic Requirements**

While it has not been possible for the Coast Guard to develop a comprehensive set of rules covering all aspects of the tanker oil pollution problem in the period since the Ports and Waterways Safety Act became law, one thing that a review of accident reports has made clear is that insuring adequate human performance is most important in avoiding tanker accidents. While much remains to be learned about why humans sometimes fail to perform adequately and about the interrelationships between man and the other system components, the Coast Guard has concluded that it is important to act now on what has been learned in an attempt to bring about improved human performance. An advance notice of proposed rulemaking entitled "Marine Traffic Requirements" was therefore published along with the proposed regulations for tank vessels in domestic trade on June 28, 1974. The notice indicated that the Coast Guard was considering requirements for improved operating practices and mandatory navigation equipment, and solicited comment from the public. Requirements incorporating provisions contained in the advance notice were rejected for purposes of these regulations only because more work remains to be done by the Coast Guard to prepare proposed rules which effectively achieve the objectives set out in the advance notice.

#### **Inerting Systems**

The rules proposed on June 28, 1974, contained no requirements for cargo tank inerting systems. Proposed rules for tank vessel safety improvements, which include cargo tank inerting systems on crude oil tankers over 100,000 DWT and on combination carriers (bulk/oil and ore/oil vessels) over 50,000 DWT, were subsequently published in the April 21, 1975, Federal Register. The primary benefits of inerting are safety benefits, since only a small fraction of oil inputs to the oceans results from cargo tank explosions. (Refer to page 37.)

#### **Posting of Vessel Maneuvering Information**

One area of inquiry concerning efforts to improve human performance in piloting large tankers concerns the information that a vessel's pilot or master needs to have to safely direct the vessel's movements. Requirements that certain information on the maneuvering and stopping characteristics of all ships over 1,600 gross tons (not just tankships) were published in the January 15, 1975, Federal Register. While not a part of these rules, requirements for posting of vessel maneuvering information are a part of the Coast Guard's overall program for implementing the Ports and Waterways Safety Act.

#### **Improved Radar Training**

Another measure which could have an effect on accidental oil outflows is a requirement for improved training for ship's officers in the use of radar in collision avoidance. Such a requirement was rejected for purposes of these regulations because additional work is needed before regulations are issued. The Coast Guard is currently working with the Maritime Administration and various maritime training schools and institutes to make improved courses in the use of radar available to a greater number of mariners. The Coast Guard has also moved to substitute approved radar school courses for the plotting portion of the Coast Guard examination given for original licenses, license renewal, or upgrading of a license. Such courses have proven more effective than pen-and-pencil exams. Providing proper training in the use of radar in avoiding accidents is an important step toward reducing the possibility of collision and grounding.

**Improved Standards for Training and Watchkeeping**

Regulations setting improved standards for training and watchkeeping were rejected as an alternative for purposes of these regulations because additional progress toward achieving international agreement on standards is needed before regulations can be proposed. In early 1970, an IMCO working group reported:

"\* \* \* that in view of the continuing alarming rise in maritime casualties and pollution, it is necessary for urgent action to be taken aimed at strengthening and improving standards of training and professional qualifications of mariners as a means of securing better guarantees of safety at sea and protection of the marine environment."

Since 1971 the IMCO Sub-Committee on Standards of Training and Watchkeeping has been working with U.S. participation to prepare documents dealing with personnel standards and qualifications which can form the basis for an international conference on the subject, tentatively scheduled for 1977. Most of the world's merchant fleet sails under foreign flags. This means the United States does not have direct control over standards for crew training and watchkeeping on these ships. It is most important, therefore, that the problems of improving training and professional qualifications, particularly on foreign vessels where standards may not be as high as on U.S. ships, be approached on an international basis through IMCO.

**Reduction of Oil Consumption or Reduction of Oil Imports**

Both of these are being discussed as proposed national goals for economic, political, and social, as well as environmental reasons. Neither of these can be considered serious alternatives to the pollution prevention regulations under consideration, although they will have an impact on the number and size of tankers needed to meet transportation needs on construction of new tankers. Recent reduction in demand for transportation of crude oil, along with delivery of new tonnage, have led to the availability of surplus tonnage, collapse of the tanker market, idle ships, and cancellation of orders for new tonnage. Such conditions

mean owners must reduce operating costs as much as possible. It also means marginally profitable vessels will be laid up until market conditions improve. Therefore, these cannot be considered realistic alternatives to the proposed rules.

**Use Different Mode of Transportation for Oil**

The use of some alternate mode of transportation for oil cannot be considered a serious alternative to the pollution prevention regulations. Tankers have evolved to fill a need for transportation that cannot be met by other modes.

**4.4 Discussion of Reasons for Rejection of Alternatives****Tanker Accidents**

Section 3.2 outlined the sources of marine pollution from tanker accidents and estimated (Table 4) how much oil is deposited annually from accidents. A tanker accident, like any accident, can be defined as an undesirable and unexpected happening. Because of the adverse consequences of accidents, personnel involved with any activity, including tanker operation, generally follow methods and procedures which eliminate the causes leading to accidents. This results in an accident being a rare happening which is almost always a surprise to the people involved. Since people usually eliminate the causes leading to an accident, one would expect that when an accident did occur, the particular cause or causes would be easy to identify. Unfortunately, this is not always true. Infrequent occurrence of accidents, their surprising nature, and the lack of knowledge of why humans fail, make accidents difficult to analyze. Accident analysis always occurs after the unexpected event and is often complicated by emotional and legal problems. It is, therefore, important not to over-simplify accidents by attributing them to a single, simply-stated cause, and to recognize that when dealing with them, one is faced with rare events which almost always involve some human failings and which are difficult to analyze.

For discussion purposes, tanker accidents shown in Table 4 can be grouped into four categories: (1) those resulting from misdirected motion of the ship -- collisions, rammings and groundings; (2) structural failures; (3) fires and explosions; and (4) breakdowns.

### **Collisions, Rammings, and Groundings**

Collision, ramming and grounding accidents occur when the normal sequence of vessel navigation is interrupted or otherwise becomes inadequate for the circumstances. The sequence of events leading to a casualty are:

1. A problem arises;
2. The shipboard personnel recognize that a problem exists;
3. The problem is "sized up" and alternative courses of action are evaluated;
4. Action is taken to control the problem (usually engine commands and/or rudder commands, although other actions, like dropping an anchor, are possible);
5. The vessel responds to the action;
6. Shipboard personnel sense the vessel response, re-evaluate the problem and take further action if necessary; and
7. Either the problem is resolved or a collision, ramming or grounding accident occurs.

If the accident is avoided, which is generally the case, no further action is required. However, if the accident occurs, then the personnel involved must take further action in order to keep the consequences to a minimum. It follows that there are two avenues which can be taken in order to reduce accidental pollution from tankers: (1) prevention before the accident occurs and (2) mitigation of the consequences after the accident occurs.

### **Preventive Measures**

Preventive and mitigating measures will both be discussed; however, it should be noted that in overall system safety,

preventive measures are far more effective than mitigating measures. Preventive measures which can be taken to reduce the risk of a ship motion accident must be discussed in terms of the seven-step sequence leading to a casualty just discussed. Examination of that sequence points out that much more is involved than the ability of vessels to respond to engine and rudder commands. Because of this, the Coast Guard feels it is necessary to expand on the terms "maneuverability" and "stopping ability" contained in 46 U.S.C. 391a(7)(A). In order to respond to the intent of that law which is to "reduce the possibility of collision, grounding or other accident," the Coast Guard has chosen to define the term *controllability*, which is the ability of a vessel to successfully navigate from a certain specified location to another specified location. Controllability is composed of the following aspects:

- a. *Maneuverability* of a specific ship; stopping ability is included within the category of "maneuverability."
- b. The *environment* in which the specific ship is operating, including considerations of time of day, visibility, wind, current, and stage of tide.
- c. The constraints imposed by the *geographic location* within which the ship is operating, including considerations of depth of water, channel width, channel configuration, channel obstructions such as shoals, bridges, docks, etc., vessel traffic density, and availability of external aids to navigation.
- d. The *human element* as represented by the specific vessel personnel who must utilize their skills to evaluate the interactions of maneuverability, environment and geographic location and react correctly to the evaluation.

By using this definition of controllability, not only is the inherent maneuvering capability of a vessel considered, but also the locations where the ship operates, the surrounding environmental conditions, and the people operating the ship (probably the most important element). Each of these aspects by themselves deserve attention in evaluating accident preventive measures. However, concentrating efforts on one aspect without taking into account the others or their interrelationships will not be very productive.

The Coast Guard recognizes the importance of the interrelationships and is proceeding to evaluate and understand all the aspects of controllability and their interrelation. Our efforts to date have resulted in some preventive measures: Regulations for the posting of maneuvering information on the bridge, proposed regulations for navigation equipment, improved radar training for bridge personnel, IMCO Standards of Training and Watchkeeping, and regulations allowing the Captain of the Port to temporarily control traffic in areas determined to be especially hazardous. Preventive measures like these have a favorable impact on the first four steps of the seven-step sequence leading to a casualty. Still these regulations offer only partial solutions because the complexity of the problem makes it difficult to determine acceptable criteria against which vessel design and operations, channel configuration, traffic density, and environmental factors can be weighed. Simply stated, the problem is tough and we don't know all the answers.

### **Maneuverability**

One aspect of controllability — maneuverability — has received more attention than the other aspects. Most comments received stated that the regulations should require improved maneuverability in tankships by requiring such design features as twin screws, twin rudders and bow thrusters. However, it is important to see that design features like these will affect only step 5 (vessel response) of the seven-step sequence leading to a casualty.

### **Stopping**

Stopping ability of a ship is measured by both the distance and time required to stop from a given speed. The main factors which affect stopping are:

- a. Speed of ship at beginning of stopping maneuver.
- b. Amount of reverse thrust available for stopping, which is chiefly a function of the installed horsepower, type of propulsion system, and type and size of propeller.

- c. Time lag in applying reverse thrust.
- d. Amount of hydrodynamic resistance (drag) of the ship's hull.
- e. Mass of ship and cargo.

To improve stopping ability of tankers it is necessary to make improvement in any or all the above areas. Obviously, reducing ahead speeds will result in shorter stopping distances — a fact which shouldn't be taken lightly.

Compared to other forms of transportation, ships have a very low resistance to motion. The drag force (expressed as a fraction of each vehicle's weight force) of several vehicles may be compared as follows:

Automobile	0.07 - 0.1, depending on speed
Rail car	0.05
Merchant ship	0.01 - 0.001
Large tanker	0.0005

If a large tanker were capable of moving on land, it would roll on a grade too small to be perceptible. (14) This is, of course, one of the things that has led to use of large tankers — they move easily through the water and are very efficient (and therefore inexpensive) users of energy.

To overcome resistance and move the ship through the water a maximum propeller thrust of only a small fraction of the weight force is all that is required. For stopping the tanker considered above the maximum combined reverse thrust and hull resistance forces are about one thousandth of the vessel's weight, providing decelerations of .001 g, or very roughly a knot per minute. Trials of such ships confirm 15 or 20 minutes is required to come to a stop from full speed. (14) But, such sluggish behavior is inherent in a low-drag vehicle and is not the result of any avoidable shortcomings in design.

Measures which have been frequently discussed by the public to improve stopping are increasing astern horsepower, installing

a controllable pitch propeller and installing auxiliary braking devices such as brake flaps and water parachutes.

Astern horsepower, which is usually some fraction of the design horsepower, affects the reverse thrust available for stopping. Design horsepower for a tanker is determined by requirements for the steady state steaming condition which constitutes a majority of a ship's life. In addition to safety considerations, other primary concerns of an owner when specifying the type of propulsion plant for his ship are high reliability, ease of maintenance and efficient use of fuel. From the standpoint of overall engineering efficiency, the propulsion system in a supertanker is very effective. The fact that the system has been optimized for steady steaming does not mean that the ship is unsafe from a maneuvering viewpoint.

Increasing astern horsepower will decrease stopping distance, but not very effectively. For example, providing *double* the normally installed astern horsepower would decrease stopping distance for a 250,000 DWT tanker traveling at 16 knots from 15 ship lengths to 12 ship lengths (a decrease of approximately 20 percent). A similar reduction in stopping distance can be achieved by slowing the ship from 16 knots to 13 knots in anticipation of a possible need to stop, such as when approaching more confined waters or a maneuvering situation.

A controllable-pitch propeller (CPP) would also shorten stopping distance, but again not to a large degree. Estimations based on manufacturers' reports are that CPP's would reduce the stopping distance of a standard 250,000 DWT tanker by 30 percent from 15 ship lengths to 10.5 ship lengths. A similar reduction in stopping distance can be achieved by reducing speed from 16 knots to 12 knots.

Auxiliary braking devices such as water parachutes and brake flaps act to increase the hydrodynamic resistance of the hull and thereby supply a retarding force to vessel forward motion. Since these devices depend on hydrodynamic resistance, which is roughly proportional to the square of ship's speed, they are relatively ineffective for ship stopping from slow speeds. Doubling

the hull resistance on the standard 250,000 DWT tanker would decrease the stopping distance from 16 knots by approximately 20 percent from 15 ship lengths to 12 ship lengths. Such an increase in hull resistance at 16 knots could be achieved by installing one 10 feet wide by 30 feet high flap on each side of the ship or by installing 12, ten feet in diameter, water parachutes, six per side.

This component of maneuverability has been discussed more than any other. Newspaper editorials, magazine articles, books and general public comment have all focused on the inadequate stopping ability of tank vessels. It is less clear, however, that stopping ability is, in fact, inadequate or that poor stopping ability has been a primary contributing factor to accidents. In the more than eight years since the first 200,000 DWT tanker (IDEMITSU MARU 1966) was put into service, the Coast Guard has not been able to document one case where inadequate stopping of a large tanker was a major contributing cause in a marine accident.

In comparison to smaller ships a large tanker requires more time and more distance to stop because of the tremendous mass of the vessel and its cargo. As already mentioned, the stopping distance of a standard 250,000 DWT tanker from service speed is approximately 15 ship lengths and there is no means by which this distance could be drastically reduced so that the ship could stop on a dime. Furthermore, there is no need for such a capability.

Those situations where a ship would be called upon to stop from full speed are extremely rare. In the open ocean where full speed is used, large tankers can readily detect the presence of other shipping and evade collisions with minor deviations from course. In an emergency, the most effective evasive maneuver is to put the ship into a turn assuming adequate room and water depth. The reason for the effectiveness of this maneuver is that the maximum distance travelled in the direction the vessel was originally moving at full speed, if full rudder is used is approximately 3 ship lengths in comparison to the 15 ship lengths required to stop.

In more confined waters and in harbors vessel speeds are reduced which results in shorter stopping distance. The average 250,000 DWT tanker will stop in less than 4 ship lengths when travelling at 6 knots. Also, in such waters and in and around offshore loading systems, large tankers have been assisted in their maneuvering, including stopping, by tugs in the same fashion as are other large ships (i.e., aircraft carriers, passenger liners and high speed container ships).

#### Turning Ability

The second aspect of vessel maneuverability — turning ability — is not discussed nearly as much as stopping ability, but is equally important. At operating speeds the turning radius of a specific vessel is the accepted measure of a vessel's turning ability. Turning radius is a function of the vessel shape, length-to-beam ratio, and rudder forces. Tank vessels, as presently designed, have excellent turning ability mainly because of their full shape and low length-to-beam ratio. The turning radius for a 250,000 DWT tanker is approximately 1.3 ship lengths while that of a much smaller and finer-lined Mariner class cargo ship is approximately 2.2 ship lengths. Possible design features, which would affect turning ability, are increasing rudder area, twin screws, bow and stern thrusters, faster rudder rate, flapped rudders and rotating cylinder rudders.

Installation of twin rudders would make it possible to increase the rudder area for a particular ship, thereby increasing the turning ability, *provided* twin screws were also installed so that the rudders would work in the propeller race. An increase of 60 percent in the presently designed rudder area for a standard 250,000 tanker would increase an already excellent turning ability by only 10 percent, thereby reducing the turning radius to about 1.2 ship lengths.

Turning ability at zero or very slow speeds can be substantially increased by installation of bow and stern thrusters. Generally these devices are ineffective at vessel speeds greater than 6 knots. Improvement in low speed maneuverability would help reduce those accidents in and around berths and piers —

most of which are ramming. However, of the one million tons of oil pollution from worldwide tanker accidents in the past five years, only 14,000 tons or 1.4 percent resulted from ramming casualties. Effectiveness of thrusters in reducing ramming casualties is not known. A further consideration in this area is the cross relationship of the human element and vessel design relating to bow and stern thrusters. At the Netherlands Ship Model Basin, where experiments of tanker maneuvers are conducted on a ship handling simulator, ship performance with the thrusters was observed to be worse than the standard ship not so equipped until after the pilots became practiced in using the new equipment on the specific test model.

Twin screws would also have some positive effect on the zero or very slow speed turning ability of tankers. By running one screw ahead and the other astern, a twisting moment (sic) is applied to the ship which will assist in turning the ship. However, this turning assist is not nearly as large as that for thrusters and is therefore less effective. Increased rudder rate has a very slight effect on turning ability. Increasing rudder rate on a standard 250,000 DWT tanker by 50 percent would increase turning ability by approximately 1-2 percent. Alternate rudder designs such as flapped rudders or the rotating cylinder rudders are promising innovations which could increase turning ability. However, these systems are still in the developmental stage and have never been used on large ships.

#### Course Changing

Course changing ability is closely related to turning ability, but differs in that it indicates the ability of a vessel to initiate or check a turn at operating speed. This aspect of maneuvering is measured by a standard maneuver known as the zig-zag or "Z-maneuver." Vessel design factors which have a major influence on course changing ability are mass, length, hull form, rudder area and rate of rudder deflection. Since mass, length, and hull form are generally fixed for large tankers, improvement in course changing ability would need to come from either increased rudder area or increased rate of rudder deflection. Again using a standard 250,000 DWT tanker as a measure, an increase in rudder area by

60 percent would improve course changing ability as measured by the "Z-maneuver" by approximately 10 percent. Increasing rudder rate by 100 percent would increase course changing ability by less than 10 percent.

#### **Course Keeping Ability**

Course keeping ability, sometimes called course stability, refers to the ability of a vessel to steer a straight course with minimum rudder action. One of the concerns about large tanker maneuverability has been the lack of course stability. Generally there is a misunderstanding regarding course stability. A clear distinction must be made between a dynamically stable ship and a directionally stable ship. A vessel is considered dynamically stable on a straight course if, when disturbed from her steady motion, she will soon resume that same motion along a slightly shifted path without any correcting rudder being applied. A steered ship is said to be directionally stable if sustained oscillations of the ship's motions or if the rudder motions needed to compensate the ship's heading errors are sufficiently small to be considered tolerable. Most full-form ships, regardless of size, cannot achieve dynamic stability, but can achieve an acceptable degree of directional stability. It is most desirable for a commercial vessel to possess directional stability. Loss of directional stability results in economic penalties due to increased voyage time and increased fuel consumption. Therefore, vessel owners have incentive to insure adequate course stability through design. Design factors which have a major effect on course keeping ability are vessel shape, length-to-beam ratio, rudder area and steering control system response parameters.

#### **Design Changes to Improve Maneuverability**

At this point it is evident that several design changes can be made to tank vessels in order to improve their inherent maneuverability. However, it should also be clear that none of the changes could be expected to improve the maneuverability of large tankships by more than 30 percent. The fact is that, because of their size, large tankers cannot be made to maneuver as readily as smaller ships. This realization is not surprising when one compares large ship operations with an analogous situation on the

highways where a 60,000 pound multi-axle truck is much less maneuverable (in terms of stopping and turning ability) than a 3000 pound automobile.

Realizing that inherent maneuverability of tank vessels can be improved, the questions to be asked are:

- a. Is there a need to improve the maneuverability?
- b. If the maneuverability is increased, what effect will this have on accident reduction?

One indication of a need to improve large tank vessel maneuverability would be if accident data indicated that large tankers were experiencing collision, ramming and grounding accidents at a rate greater than smaller vessels. Intuitive feeling is that large tankers should have a higher accident rate. However, this intuitive feeling is not supported by accident information. Worldwide accident figures (8) indicate that during the period 1969-1973, tankers over 150,000 DWT were involved in collisions, ramming, and groundings at the rate of 0.0465 involvements per ship year. (This means that based on the past five years of accident data, one could expect 4.65 percent of those tankers greater than 150,000 DWT to have a collision, a ramming, or a grounding each year.) The average frequency for all tankers greater than 3,000 DWT is 0.0958. The group of tankers having the highest frequency of accidents are those in the 20,000 - 40,000 DWT range where their frequency is 0.1265.

Another indication of a need to improve large tank vessel maneuverability would be if the analyses of individual collision, grounding, and ramming accidents showed that a lack of maneuverability was a major contributing factor (sic) in these accidents. To examine for this, Coast Guard casualty information for years 1972 through 1974 was sorted by the recorded cause of the accident. These sorts showed that there were 1206 vessels greater than 10,000 gross tons involved in collision, ramming, and grounding accidents. Of these 1206, only 80 (or 6.6 percent) could be attributed to inadequate vessel maneuverability, and most of these were the result of a breakdown of the installed propulsion and maneuvering system. In addition to sorting all casualties by

cause, individual accident records have been reviewed to see if the maneuvering design of the ships involved was inadequate. Results of the cause sort and individual accident investigations show that more than 65 percent of the accidents were caused in whole, or in part, by "inadequate human performance." Only 6 percent were attributed to inadequate vessel maneuvering capabilities. These percentages do not change appreciably with vessel size.

None of the casualty analyses conducted to date demonstrate a need for improved maneuverability of large tankships. While no need has been established, the Coast Guard does not consider its work in casualty analysis complete. As more is learned about the complex man-machine system which controls the movement of a ship from one port to another, the Coast Guard will be capable of analyzing individual casualties with new insights. In addition, as more is known of traffic patterns and tanker operations, worldwide tanker casualty information could be analyzed using various measures of exposure and risk, such as number of high risk areas traversed per year or amount of oil delivered per year per average ship size.

Just as no need for improved tank vessel maneuverability has been found, neither have we been able to determine how effective a particular improvement in maneuverability would be in reducing tanker accidents.

Because neither the need nor the effectiveness of improved maneuverability has been established, the Coast Guard feels there is inadequate justification for proposing regulations for such things as twin screws, twin rudders, bow thrusters, greater backing power, and controllable pitch propellers at this time. This is not to say that some minimum vessel design for maneuverability should not be established. But, the basis for establishing such a minimum must be its relation to the entire controllability question, and not just to the inherent maneuvering capability of the ship, as measured by standard maneuvers. When viewed in this context it becomes apparent that the minimum design standard necessary to insure safe navigation will vary for the same

ship from port to port and even within the same port area during varying weather and tidal conditions. What the Coast Guard must be able to do is: (1) identify those parameters of vessel movement which accurately measure its total controllability; (2) evaluate those parameters against the acceptable level of risk for that particular harbor or waterway and weather conditions; and then (3) determine if additional precautions, such as tugs, should be required. In using such an approach, the Coast Guard will offer the prospective ship buyer incentives to incorporate those individual added design features which he feels are to his economic advantage, while at the same time allowing him flexibility in evaluating the economic trade-off of vessel design. For example, if when transiting a particular bridge under certain wind and current conditions, a tanker equipped with the conventional maneuvering systems, is by a Coast Guard regulation required to wait at anchor and thus delay its arrival, or alternatively hire tugs, and if the same tanker would have been allowed to transit the bridge had she been equipped with thrusters, the lost revenue accruing from the delay and increased ship, operating, and crew expenses, and possibly tug costs, may cause the tanker owner to install thrusters on similar designs in order to achieve an economic benefit. Another beneficial feature of this incentive approach is that it can be applied to all existing vessels, both foreign and domestic.

### **Reliability**

So far in discussing the maneuvering aspect of controllability, we have focused on the performance of vessels as designed. Another area of maneuverability is the reliability of the installed maneuvering system. Design features commonly discussed which would affect reliability of tank vessels are twin screws, twin rudders, twin boilers, and steering gear redundancy. Twin screws would allow partial propulsion power if one shaft were inoperable. Occurrences of breakdown when tankers were unable to proceed and subsequently resulted in pollution are very low. There were only 11 cases worldwide in the past five years during which time there accumulated approximately 21,000 tanker operating years. This record would indicate that installed propulsion systems,

which were mostly single rudder, single screw systems, have been reliable.

Propulsion power for large tankers is either provided by heavy slow-speed diesel engines or by a steam power plant. The United States has had little experience with slow-speed diesels, but the reliability has been proven in European and Japanese tankers. When the steam system is used, it is conceivable that only one main boiler may be installed, but the practice is to include provision for take-home capability such as that on the nuclear powered SAVANNAH. This is often done by installing an auxiliary boiler with the capacity to propel the vessel at considerably reduced speed through the low pressure stages of the main turbine. Duplication of the steering gear system is required by Coast Guard regulations, and that, coupled with recent recommendations of the Inter-governmental Maritime Consultative Organization (IMCO), seem adequate to insure sufficient steering system reliability.

The seven-step "sequence of a casualty" discussed previously and the subsequent discussion of controllability both indicate that insuring adequate human performance is most important in preventing ship motion casualties. While much remains to be learned concerning why humans fail to perform adequately and of how the human aspect relates to the other aspects of controllability, the Coast Guard believes it is necessary now to take steps to improve human performance, and enough information is available to do so. Therefore, in the June 28, 1974, Federal Register an Advance Notice of Proposed Rulemaking entitled "Marine Traffic Requirements" was published to inform the public that the Coast Guard has determined that there must be an improvement in the operating practices aboard all major vessels on the navigable waters and to set forth our concepts about how this could be done. Many comments were received on the advance notice. They are presently being evaluated, along with other inputs, in order to arrive at an effective set of rules to meet our objectives.

### **Mitigating Measures**

Tanker accidents cannot be totally prevented by any or all of the measures discussed above or otherwise proposed. So long as oil is moved by sea, risk of accidents involving tankers which result in the release of oil will exist. It is necessary therefore to consider measures which will minimize the effects of accidents after they have occurred. Double hull construction (double bottom, double sides, or both double sides and double bottom), reduction of tank size limits, rapid removal of oil cargo from tanks open to the sea and cleanup of spilled oil are possible measures to reduce oil outflow or its effects.

### **Double Bottoms**

The question of how effective the installation of double bottoms, double sides, or both might be in reducing oil outflows due to tanker accidents has received considerable attention. Until very recently, there were no double bottom tankers, and so there is no accident experience to rely on. Estimates of effectiveness of these measures must rest on (1) our knowledge of how past accidents of conventional tankers have resulted in oil pollution, and (2) estimates of how effective a double bottom or side installed in such a vessel might have been in preventing penetration of the cargo space and subsequent oil outflow. Tanker accidents, which everyone agrees occur all too frequently, are for statistical purposes relatively rare events, subject to the usual hazards of drawing inferences from relatively small samples. Table 10 presents information developed by the Coast Guard on tanker accidents over the five-year period, 1969-1973. Several important conclusions can be drawn from this information:

- a. Side-damaging accidents (collisions and rammings) resulting in oil outflow occur with greater frequency than those resulting in bottom damage, the ratio being 1.4 to 1. Frequency of occurrence is one measure of pollution potential.
- b. Estimates of the total quantities of outflow from these two types of accidents, e.g., side and bottom damage, are about equal and are both large enough to warrant equal concern as to design measures to mitigate outflow.

- c. Structural failures have resulted in the largest amount of outflow. These are being explored further to look for causal factors.

It is important to note that the major portion of the outflow (80 percent) resulted from a small portion (2 percent) of the total number of involvements which resulted in total loss of the vessel as indicated in Table 10.

As a check on the validity of these figures for worldwide accidents, information on incidents occurring within 50 miles of the U.S. coastline is presented in Table 11. The correlation between the data is good in the area of frequency of incidents and relative outflow by accident type.

Certain known statistical factors about casualties in U.S. waters must be kept in mind. First, collisions are the prevalent accident type, overall. Also, the surrounding physical characteristics of a port area have a great deal to do with accident types to be anticipated. Where channels are wide and the water deep, collisions would be expected to dominate. Where water is shallow with respect to the using vessel's drafts, groundings should be expected. There is a wide diversity of conditions encountered in U.S. ports and even within individual port areas. It is known that most accidents to tankers do not involve breaching of the hull. Likewise, a small number of accidents involve such high energy levels that no reasonable combination of construction features would be effective.

#### **Effectiveness of Double Bottoms**

Several attempts have been made to examine reports of tanker groundings and assess after-the-fact how effective a double bottom installed in the vessel might have been in preventing oil outflow. A major problem in any such effort is obtaining the necessary information. So is the statistical design of the study. A study of vessel accidents occurring in U.S. waters, involving tankers of all sizes which suffered bottom damage resulting in pollution during the period 1969-1973, revealed 30 such incidents (15). In 27 of these 30, that is, 90 percent of the cases, the extent of the vertical damage was less than 1/15 of the vessel's beam.

For this sample, then, we can infer that double bottoms having a height of B/15 might have been 90 percent effective in preventing oil outflow. No similar such study has been done for tanker collision involvement.

TABLE 10. Tankship Involvements, 1969-1973, Tankships Over 3000 Deadweight Tons

Type of Involvement	Number of Involvements	No.	Total Losses			Involvements Resulting in Oil Outflow		
			Oil Outflow	Involvement No.	Involvement No.	Oil Outflow	Involvements Oil Outflow	
Breakdown	355	2	29,350	11		29,940		
Collision	744	7	140,779	126		185,088		
Explosion	104	11	88,780	31		94,803		
Fire	197	1	1,250	17		2,935		
Grounding	790	12	134,449	123		230,806		
Ramming	473	—	—	46		13,645		
Structural Failure	515	15	322,519	94		339,181		
Other	5	3	54,790	4		54,911		
TOTALS	3,183	51	771,917	452		951,309		

Source: J. C. Card, P. V. Ponce, and W. D. Snider, "Tankship Accidents and Resulting Outflows, 1969-1973," *Proceedings of 1975 Conference on Prevention and Control of Oil Pollution, San Francisco, March 1975.*

Exhibit X

Exhibit X

TABLE 11. Tankship Involvements Occurring Within  
50 Miles of U.S. Coastline, 1969-1973  
Tankships of 100 Gross Tons and Over

	No. of Incidents			No. of Incidents with Outflow			Oil Outflow Amounts		
	U.S.	Fn.	Total	U.S.	Fn.	Total	U.S.	Fn.	Total
Collision	206	121	327	13	13	26	4,655	2,276	6,931
Ramming	261	50	311	16	5	21	1,571	2,750	4,321
Collision and Ramming Subtotal	467	171	638	29	18	47	6,226	5,026	11,252
Grounding	304	83	387	20	9	29	3,886	11,991	15,877
Structural Failure	74	7	81	8	7	15	533	5,935	6,468
TOTALS	845	261	1,106	57	34	91	10,645	22,952	33,597

Source: Compiled by USCG (G-MMT-1/82) from U.S. casualty investigation reports and Lloyd's Weekly Casualty Reports, 10/74.

### Problems of Double Bottoms

Two potential problems arise with double bottoms: Flooding of double bottom tanks as a result of grounding could lead to loss of buoyancy and heeling due to unsymmetrical flooding making refloating and salvage more difficult, increasing risk of loss of the vessel and greater pollution. Internal leakage of cargo into double bottoms through access fittings or cracks in inner bottom could result in accumulation of explosive vapors creating an explosion hazard and toxic vapors creating a personnel hazard for anyone entering the tank. Again, because of the lack of operating experience it is difficult to assess how serious these problems are. Installation of inert gas systems serving double bottom tanks would reduce possible hazard of explosion. [The Coast Guard has issued a notice of proposed rulemaking proposing that inerting systems be required on crude oil carriers over 100,000 DWT and crude oil combination carriers over 50,000 DWT. (12)] Overall, the

Coast Guard feels that these problems do not represent grounds for rejection of the double bottom concept.

The cost of incorporating double bottoms has been variously estimated at between 2 percent and 13 percent of new construction cost. Some of the higher estimates quoted are for providing both segregated ballast and double bottoms, so the incremental cost of double bottoms for ships already incorporating segregated ballast would be lower than the high estimates of reference (13).

The Coast Guard is not *opposed* to double bottoms, but at the time proposed rules were published in June, 1974, felt that from the accident data available, no particular type of damage so dominated the accidental release of oil that a single design solution should be stipulated in law or regulation. The data support the need to place greater emphasis on designing tank vessels from the point of view of minimizing accidental oil pollution. New tank vessels over 70,000 DWT must be designed with up to 20 percent additional volume in order to meet the segregated ballast draft and trim requirements contained in the proposed regulations. (The exact amount of additional volume depends on a number of factors including ship size, amount and location of fuel carried, and the amount of water ballast the ship carried anyway.) The Coast Guard recognized optimizing the location of this volume as defensive space could provide significant improvement toward reducing accidental outflow. A special group was convened to review the problem and examine possible regulatory approaches capable of improved protection in accident circumstances, but without specific constraints which would inhibit future development of promising design concepts not yet identified. The results and recommendations of this group are contained in Appendix C and have been incorporated in regulations setting criteria for distribution of segregated ballast.

#### Tank Size Limits

The alternative of reducing tank size limits is discussed in reference (17), page VI-56.

Halving of tank size limits will affect both accidental oil spillage and operational discharges. Based upon IMCO studies, reducing the tank size by a factor of two would reduce accidental oil outflow from a standard 250,000 DWT tanker by approximately 17 percent. Increasing the number of bulkheads will increase the complexity of piping and create more surface area to which oil cargo can cling during the discharge operation. This increases the amount of oil which must be cleansed from the tank and separated out during LOT and sludge removal operations. Therefore, further subdivision of cargo tanks will tend to increase the amount of oil pollution due to tanker operations thereby offsetting the reduction from accidental pollution. In addition to increased complexity of piping systems, other disadvantages of reducing tank size are increased steel weight of vessel (reduced DWT), increased chance for overfilling a tank during loading operations and longer loading times.

The formula adopted for segregated ballast distribution criteria does require decreased tank sizes in some construction options. For example, should a designer choose to use a staggered wing distribution of ballast, tank sizes must be considerably reduced for the vessel to meet the distribution criteria.

#### Structural Failures

As indicated in Table 10, structural failures resulted in the largest amount of outflow from tanker accidents over the five-year period, 1969-1973, and the bulk of this was from ships which were total losses. Table 12 presents results of a separate survey of 47 tankships lost, showing that loss of ship as a result of structural failure of the main hull girder was the largest single source of oil outflows.

There are a number of factors which affect the overall structural integrity of tankers over their service life. The initial strength of the vessel depends on the ship designer, ship builder, and the classification society and regulatory agencies they work with. During the vessel's operating life, its strength may be affected by the amount and distribution of the weights it carries,

the weather and sea conditions it operates in, and the deterioration due to corrosion or other causes.

The structural design of ships is a complicated process. Merchant ships must have adequate structural strength for the service they are to see, with margins for unknowns and normal wear and tear. There is little virtue in excessive strength beyond this point, since it involves excess weight, higher transportation costs, and less efficient operation. The problem is to determine "adequate structural strength" and the required margins. There are two basically different approaches to structural design — "evolutionary" and "deterministic." The first of these develops satisfactory rules and procedures on the basis of trial, experience, and modification. In the "deterministic" approach, as many of the factors affecting the structure throughout its life as possible are determined, and this information is used to prepare a design with a minimum of reference to previous experience. Loading on the ship, material properties, corrosion rates, detailed response of the structure to each state of loading, and much more must be quantified, and then the effect of these things on the probable behavior of the structure during its lifetime taken into account, largely by calculation (18).

**TABLE 12. Description of Loss of Structural Integrity for 47 Tankship Losses, 1969-1973**  
Tankships Over 10,000 Deadweight Tons

Description	Number	Oil Outflow (Long Tons)
A. Loss of structural integrity of hull caused primarily by external forces or where local material conditions deteriorated. No explosion or fire was associated with the accident. These may be broken down into:		
1. Structural failure of main hull girders from excess bending or shear loading	12	243,619

2. Local structural failure of hull envelope		
a. Failure of hull penetration	2	36,750
b. Local hull plating failure	2	39,169
c. Unknown local structure failure	1	34,000
3. Hull damage caused by collision or grounding		
a. Collision	2	4,138
b. Grounding	11	187,726
SUBTOTAL	30	545,402
B. Loss of structural integrity from damage caused primarily by explosion or fire or where explosion or fire contributed to loss of structural integrity. These may be broken down into:		
1. Explosion or fire initiated in own ship cargo tanks	12	90,030
2. Explosion or fire set off by vessel collision or grounding		
a. Collision	4	136,163
b. Grounding	1	2,500
SUBTOTAL	17	228,693

Ship structural design currently uses a combination of these two approaches, with a growing tendency toward "deterministic" methods where no relevant previous operating experience exists. A completely deterministic approach is not feasible, however. In general, the data and statistical techniques for calculating risks of failures are not presently available. Uncertainties concerning loadings, quality of material and construction, and accuracy of analysis are taken into account by the use of margins of safety against damage selected by the designer with the help and supervision of the classification societies and regulatory agencies. Once information needed to calculate risks of failure is available, the problem of determining "What is an acceptable risk of failure?" will remain. (18)

Strength during a vessel's life may be affected by overloading,

improper load distribution, encountering rougher weather or seas than it was designed for, or deterioration of structure due to corrosion.

Limiting draft of a vessel may be determined by structural strength, freeboard needed to prevent damage due to boarding seas, or reserves of buoyancy or stability needed after loss of hull integrity. The 1966 Loadline Convention contains no strength standard, inasmuch as the various assigning authorities were not in agreement as to a proper standard. There was a universal feeling that for larger ships freeboards could safely be reduced. The final freeboard table for large ships, particularly for tanker and similar types, showed greatly reduced freeboards at the upper limit of length. However, in order to obtain the reduced freeboard, a ship must meet certain standards of subdivision and stability in a damaged condition. As a result, it is generally felt that ships will be safer, despite the reduced freeboards, because of the subdivision requirement. (19)

The requirement contained in the 1966 Loadline Convention for load distribution information to be provided to the Master of a ship will help to eliminate improper load distribution, perhaps a greater risk than overloading.

Deterioration of a ship's structure due to corrosion or wastage is also a complicated problem. In the past it has been taken into account by including a wastage allowance in the ship's scantlings. The proper allowance, being based on a predetermined period before the strength of the structure is reduced to the established minimum, is impossible to determine with exactness. Corrosion itself is a complex electrochemical phenomenon affected by a multitude of factors. (20) Loading systems, cathodic protection, and materials improvements have been used in various ways to reduce corrosion effects. Periodic inspection and maintenance to locate and correct abnormal wastage problems are also essential.

Collection and analysis of accident statistics as a check on the structural performance of tankers is important, but this information has not generally been collected and made public

worldwide, although presumably the classification societies have a good deal of such information. To provide input for revising requirements (either loadline or wastage allowance requirements) this information should include information on factors noted above.

Studies of tanker accidents seem to show an age dependency of structural failures with most failures occurring after ships are over 12-15 years of age. This is probably due to the combination of a number of factors — latent design and construction defects, deterioration of vessel's structure with age, extreme sea conditions, or other factors we do not know about. (One of the most troublesome problems is obtaining information after an accident has occurred.) Accidents involving U.S. vessels or foreign vessels in U.S. waters are investigated and published by the U.S. Coast Guard and the National Transportation Safety Board. Some other maritime nations similarly investigate and publish reports of serious accidents involving their vessels. A number of countries do not, so information on many accidents is very sketchy or nonexistent. Are these accidents the result of conditions which do not apply to other tankers (poor workmanship in one construction yard during one time period, design details unique to one vessel or class of vessel, lack of or failure of protective coating, etc.) or to more general conditions (widespread overloading, corrosion, etc.)? No one really knows.

What alternatives are available for reducing tanker structural failures? For new ships, greater initial strength could be required (increased safety factor), but how much? This would result in an increase in the amount of steel used in these ships, increased weight, increased cost, etc. The allowable loading of new and existing vessels could be reduced by increasing required freeboard and changing loadline assignments. (Unknown here is how widespread the practice of overloading is at present. It is difficult to detect overloading. Mere observation of a vessel at start and end of a voyage is not sufficient to determine that a vessel was not overloaded at some point in the trip because of the route and loadline zones transited. Many masters may be unaware of the hazards of overloading. The effects of overloading may be

cumulative — a vessel may be overloaded and still complete the voyage safely for many voyages before it is lost.) The periodic inspection of a tanker's hull to detect signs of deterioration which might lead to structural failure is a major task and it is growing as larger tankers enter service. The immensity and difficulty of this task alone may require a change in design allowances for corrosion and safety factors.

#### **Other Accident Types**

Fires and explosions are not major sources of oil outflow. They are serious safety problems from personnel and property damage standpoint and efforts are currently underway in the U.S. and internationally to upgrade fire protection systems on tankers and to require tank inerting systems. Reducing fires and explosion will also reduce accidental pollution, but the effect will be small.

The problem of breakdowns and equipment reliability were discussed earlier. The vessel's crew and owners (or operating company) play a major role in maintaining a vessel in satisfactory condition. Breakdowns in the past have contributed only a small amount to oil outflows — they are a safety and operating efficiency problem.

#### **4.5 Future Actions by the Coast Guard**

As indicated earlier, these regulations are one of a series of steps to reduce oil pollution from tankers. Some of the other steps to be taken are described below:

1. Specifications for oil/water separators, oil content monitors, and oil interface detectors are to be developed and published.
2. Proposed regulations to cover ships other than tankers which have their certificates endorsed to carry small amounts of bulk liquid cargo are to be developed and published for comment.
3. Proposed rules on marine traffic requirements are to be developed and published for comment as a followup to the Advance Notice published June 28, 1974.

4. The Coast Guard will encourage ratification of the 1973 Marine Pollution Convention by the United States and work to bring it into force internationally. The Coast Guard will continue to participate in meetings of the Marine Environmental Protection Committee of IMCO and work toward international solutions to marine pollution problems.
5. The need for additional construction requirements for inland tank barges is being analyzed and proposed regulations will be drafted in the future.
6. Proposed rules for U.S. tankers in foreign trade and foreign tankers entering U.S. waters will be developed and published for comment in order to have final rules effective as required by Title II of PWWSA.
7. Regulations to implement the 1973 Marine Pollution Convention for ships other than tankships will be developed. These regulations will apply to the discharge of oily ballast and bilge water at sea from vessels other than tankers.
8. The Coast Guard will work with other Federal agencies and appropriate facets of the marine industry to see that required reception facilities are available to reduce oily bilge and product tanker discharges to the sea.
9. The Coast Guard will continue to work on ship controllability problems to reduce collisions, rammings, and groundings.

#### **5. PROBABLE ADVERSE ENVIRONMENTAL EFFECTS WHICH CANNOT BE AVOIDED**

The overall effect of these regulations will be to reduce the amount of oil entering the oceans as indicated in Section 3. No adverse environmental effects are anticipated as a result of this action.

**6. RELATIONSHIP BETWEEN LOCAL SHORT-TERM USES OF MAN'S ENVIRONMENT AND THE MAINTENANCE AND ENHANCEMENT OF LONG-TERM PRODUCTIVITY**

Both short-term and long-term fates and effects of petroleum hydrocarbons in the marine environment are analyzed in the NAS Report, *Petroleum in the Marine Environment* (reference 1). So far as the Coast Guard can determine, these regulations do not involve any tradeoffs between short-term environmental gains at the expense of long-term losses or vice versa. Nor are any future options foreclosed.

**7. IRREVERSIBLE AND IRRETRIEVABLE COMMITMENTS OF RESOURCES**

No significant irreversible and irretrievable commitments of resources are involved in this proposed action.

**8. COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT AND COAST GUARD RESPONSES**

Comments on the draft statement were requested from the following (\* indicates comments were received and are contained in this section):

- Department of the Interior
- \*Environmental Protection Agency
- \*Department of Defense
- \*Department of Commerce
- \*Department of Transportation
- Department of State
- Sierra Club
- Connecticut Citizens Action Group
- \*Center for Law and Social Policy (representing a number of groups (CLSP)
- \*American Petroleum Institute
- \*American Institute of Merchant Shipping

American Association of Port Authorities  
 American Maritime Association  
 American Waterways Operators, Inc.  
 Shipbuilders Council of America  
 Environmental Policy Center  
 Coalition Against Oil Pollution  
 \*National Audubon Society (AUD)

In addition, comments were received from the State of New Jersey, Department of Environmental Protection.

(Here would appear pages 87-208 of the document which have been omitted in printing.)

NATIONAL AUDUBON SOCIETY

August 6, 1974

(Part of letterhead omitted in printing.)  
 Captain Richard Brooks  
 Executive Secretary  
 Marine Safety Council (G-CMC/82)  
 Room 8234  
 U.S. Coast Guard  
 Washington, D.C. 20590

Captain S.A. Wallace  
 Chief, Marine Environmental Protection Division  
 U.S. Coast Guard (G-WEP/73)  
 Washington, D.C. 20590

Dear Captain Brooks and Captain Wallace:

The National Audubon Society has reviewed the interim rules and regulations for protection of the marine environment relating to tank vessels engaged in domestic trade, which were published in the Federal Register June 28, 1974. We have also reviewed the draft environmental impact statement that discusses those interim regulations.

We are combining our comments on the interim regulations

and the draft impact statement in this letter, a copy of which is being sent to each of you.

On January 26, 1973, the Coast Guard published in the Federal Register an advance notice of proposed rulemaking under the Ports and Waterways Safety Act of 1972. The advance notice stated that the Coast Guard was considering proposing regulations "which would require a segregated ballast capability" on tank ships, and that the "segregated ballast capacity would be achieved in part by fitting, throughout the cargo length, a double bottom \* \* \*"

We were pleased to note at the time that the Coast Guard was considering such regulations to protect the marine environment from oil pollution, and our Washington representative, Ms. Cynthia E. Wilson, transmitted our views to the Coast Guard in a letter dated March 8, 1973, in which we urged the Coast Guard to issue such regulations.

On July 5, 1973, the Coast Guard published in the Federal Register a supplement to the advance notice of rulemaking in which it was announced that further action was being deferred pending the outcome of the October, 1973 International Conference on Marine Pollution.

The interim regulations published June 28, 1974 constitute a resumption of the rulemaking process announced on January 26, 1973.

And, we regret to say, the interim regulations published June 28, 1974 also constitute a retreat by the Coast Guard from the segregated ballast and double bottom approach originally contemplated.

We recognize that when implemented, the interim regulations issued June 28 are likely to bring about a reduction in the amount of oil pollution from tankers, and we applaud you for that small step forward. But the interim regulations are needlessly timid and too small a step forward.

Moreover, the first notice of proposed rulemaking, in January, 1973, indicated that the Coast Guard was considering applying the segregated ballast and double bottom requirements to tank barges as well as tank ships. The June 28 notice contained the unhappy news that barges are not covered by the interim regulations.

We do not pretend to have expertise in the design, construction, and operation of oil tankers and barges. However, we are somewhat familiar with the studies and reports published by the Coast Guard and others on this subject. And those studies and reports make it clear that technology is now available to require greater protection of the marine environment from oil pollution by tankers and barges than the Coast Guard is requiring in its interim regulations.

The interim regulations require segregated ballast tanks only for new tankers of 70,000 tons deadweight or more. Smaller tankers and all barges are not required to have segregated ballast tanks. Oily discharges from new vessels will be limited to a maximum of 1/30,000 of the cargo. And double bottoms are not required.

As a result, the regulations will assure continuation of unnecessary oil pollution of the marine environment in normal operations, albeit to a lesser degree than now prevails. And because of the failure to require double bottoms, the regulations will assure continuation of the unnecessary threat of catastrophic pollution in event of the grounding or collision of a single supertanker without a double bottom.

In sum, the interim regulations are inadequate. We question the implication in the preamble to the regulations that the United States cannot do more, now, to reduce oil pollution of the marine environment because, in part, of the limitations of the International Convention for the Prevention of Pollution of the Sea by Oil. The United States in the past has taken the initiative on oil pollution control by enacting more stringent regulations for oil operations within our national jurisdiction than other nations. We believe the United States should now take the lead and do

the same for tank vessels operating within our jurisdiction or carrying the U.S. flag abroad.

We therefore urge the Coast Guard to reconsider the interim regulations with a view to requiring segregated ballast and double bottoms for all new tankers, and similar or other appropriate pollution control requirements for barges.

We now want to comment on the draft environmental impact statement.

On Page 5, the draft statement says: "The proposed regulations require such (oil-water separating and filtering) equipment; but the installation of the equipment will not be required until after the effective date of regulations publishing specifications, testing, labeling and approval procedures for the equipment."

There is no indication when the necessary regulations will be issued. What is the anticipated date of publication of the necessary regulations? What is the anticipated date for the mandatory use of the equipment? We urge that the regulations be published and made effective as soon as possible.

On Page 54, the draft impact statement says: "Segregated ballast for all tankers would help to eliminate the problem of oil residues to a certain degree, but the economic consequences of this alternative for the U.S. tank fleet are unreasonable."

The "economic consequences" are not detailed, however. What would be the added cost of building segregated ballast tanks into new ships? What would that additional cost for environmental protection amount to per barrel of oil? Per gallon of gasoline to the consumer?

We agree with the comment that "present levels of oil pollution represent a serious threat to the marine and coastal environment." (Page 22.) And because of that threat, we cannot agree with the Coast Guard's decision not to require segregated ballast for all tankers and not to require double bottoms on new

vessels. And we must take exception to comments in the draft statement that attempt to rationalize the Coast Guard's decision not to require double bottoms.

On Page 5, the statement says: "The large number of existing vessels would preclude any immediate significant reduction in oil outflow due to requiring double bottoms on new vessels."

Of course there would be no "immediate significant reduction" in oil pollution if double bottoms were required, for as the draft statement notes on Page 55: "Deliveries of newly ordered double bottom tankers, resulting from the imposition of a double bottom requirement, could not be reasonably expected before 1978."

But the point is that regulations issued today should be based on planning for the future. By not requiring double bottoms on new vessels, the Coast Guard is shunning its responsibility and discarding an opportunity to minimize oil pollution in the future.

As for what is a "significant" reduction in oil pollution, any reduction of what is already "a serious threat to the marine and coastal environment" is a desirable goal.

On Page 55, the draft statement mentions projected world oil transportation needs into the 1990's. However, the source of the projections is not given and no data is given to support the Coast Guard's conclusions.

On Page 35, the draft statement notes that in 1972 "U.S. flag ships discharged 496 tons in 5 separate casualties." The draft statement then says: "It is clear from the above that a double bottom fitted only in U.S. tank ships in the domestic trade would prevent only a fraction of the total outflow and that efforts in preventing casualties should be emphasized." The statement also says: "Using a data base of one year may be misleading in that it may represent an exceptionally favorable year with respect to U.S. tank vessel accidents."

We agree that using the figures for only one year may be misleading. Thus we wonder if 1973 and early 1974 figures are yet available? But more importantly, we question the Coast Guard's decision not to require double bottoms on the basis, in part at least, of what may admittedly be a "misleading" data base.

And we also question why double bottoms need be "fitted only in U.S. tank ships" when, as the draft statement says on Page 1, "the Coast Guard must extend the applicability of these proposed regulations to encompass U.S. tank vessels engaged in foreign trade and foreign tank vessels entering the navigable waters of the United States" before January 1, 1976. (Emphasis added.) It is therefore clear that requiring double bottoms would prevent more than is implied by the phrase, "only a fraction of the total outflow."

Similarly, on Page 56, the draft statement says: "Oil outflow would only be significantly reduced if a U.S. vessel engaging in domestic trade were involved in the casualty." On the face of it, that has to be considered misleading since the Coast Guard must, by January 1, 1976, apply the regulations to foreign tank vessels entering U.S. waters.

On Page 37, the draft statement notes that areas within fifty miles of land "are most ecologically sensitive and most subject to the pejorative effects of oil." On Page 44, the draft statement says that "construction of large tank vessels . . . could lead to the possibility, in the event of a single accident, of catastrophic environmental pollution." On Page 48, the draft statement says: "Given the potentially deleterious effects of oil pollution, this level (65,000 tons of oil pollution annually) is clearly unacceptable."

We submit that those statements can be used to justify a requirement for double bottoms. Supertankers as large as 476,025 tons already sail the oceans. Even larger tankers are on order. In not too many years, supertankers may well be bringing oil to offshore deepwater "ports" or terminals in U.S. waters. If the Coast Guard considers 65,000 tons of oil pollution annually "clearly unacceptable," what of a single accident involving a

tanker of 100,000 or 200,000 or 300,000, or 400,000 tons or more, in the "ecologically sensitive" coastal waters of the United States? It would indeed be a case of "catastrophic environmental pollution."

(We don't know whether a double bottom would have prevented the tanker Torrey Canyon from spilling its oil into the sea when it went aground in 1967. But we do know that at least one tanker with four times greater capacity than the 117,000-ton Torrey Canyon is already sailing the seas.)

On Page 2, the draft statement says that the Coast Guard received many comments on "the high initial cost associated with double bottoms." What is the additional cost of building a tanker or a barge with a double bottom? What does that cost come to, in the case of a 400,000-ton tanker, in terms of additional cost per gallon of gasoline to U.S. motorists?

On Page 51, in discussing the alternative of "more stringent requirements than the 1973 Convention," the draft statement says: "Stricter measures could certainly be construed by foreign observers as a portent of the future and evidence of intent of the U.S. government *not to abide* by the provisions of the Conference agreement." (Emphasis added.) On Page 53, the draft statement notes that "zero discharge" has been stipulated by the Department of the Interior for tank vessels that will transport oil from the Alaska pipeline terminal at Valdez. (Indeed, the permit for the Alaska pipeline contains this stipulation: "It is the policy of the Department of the Interior that there should be no discharge of oil or other pollutant into or upon lands or waters.")

We want to make several points here. First, we find it difficult to believe that "stricter measures" of oil pollution control by the United States would be considered evidence of intent "not to abide" by the Convention. "Not to abide" surely means not to act in accord with the Convention in the sense of failing to meet its minimum requirements, of doing less than the Convention mandates. Second, if stricter requirements for tank vessels operating in U.S. waters would be considered as evidence of intent "not to abide" by the Convention, isn't the "zero discharge"

requirement for tankers that will haul oil from Valdez also an intent "not to abide" by the Convention? And third, is there any provision in the Convention that prohibits a nation from setting stricter standards for its own flag vessels or its own waters?

Moreover, we note with interest what Senator Warren G. Magnuson and Senator Norris Cotton, chairman and ranking minority member, respectively, of the Senate Commerce Committee, said in their March 13, 1973 letter to Admiral Bender: "Requiring that new tankers incorporate segregated ballast tanks and double bottoms, and be capable of retaining wastes on board for shoreside disposal is wholly consistent with the purposes of that Act (P.L. 92-340, the Ports and Waterways Safety Act of 1972) and will make a significant contribution to protection of the marine environment."

The draft impact statement says on Page 51 that if the U.S. would enact stricter measures than required by the Convention, "ultimately this would encourage other nations to establish unilateral requirements, to the detriment of a coordinated international approach."

If, by imposing stricter standards, the United States or any other nation would stimulate stricter standards by other nations, we suggest that would be an excellent way to stimulate the slow-moving IMCO to greater and faster action than it has so far demonstrated. A coordinated international approach is certainly desirable. But we should accept the reality that international organizations move forward slowly and ponderously. The international Convention should be viewed as the minimum for all nations to follow, not as the maximum. And certainly the United States, which has so often proclaimed leadership in pollution control and environmental protection, and which is the free world's largest user of oil, should take the leadership in protecting the environment from pollution by oil.

The Coast Guard itself noted in the draft impact statement that "present levels of oil pollution represent a serious threat to the marine and coastal environment." Half-measures are not enough to defuse that threat.

In sum, the draft environmental impact statement — like the interim regulations — is inadequate. The impact statement and the regulations seem to be motivated more by cost and political considerations than by environmental considerations.

We urge that the interim regulations be strengthened and that a new adequate environmental impact statement be issued.

In past meetings of international and regional organizations, the United States has proposed a policy of no oil discharges whatsoever anywhere in the world. Our nation cannot impose that standard throughout the world, of course. But our nation can and should require zero discharge of oil by all tank vessels operating within U.S. waters and by all U.S. flag ships operating anywhere in the world. And to the degree that zero discharge technology is available, it should be used — and as soon as possible.

The oceans, Homer wrote, are "the source of all." We must protect that source — of our water, of much of our oxygen, of much of our protein — from oil pollution to the greatest degree possible.

P.S.: We continue to associate ourselves with the views presented on our behalf by the Center for Law and Social Policy at the hearings on July 31, 1974.

EJS:SMS

Sincerely,  
Elvis J. Stahr  
President

c.c.: Senator Warren Magnuson  
Representative Leonor K. Sullivan  
Senator Norris Cotton  
Representative John M. Murphy  
Secretary of Commerce Dent  
Secretary of Interior Morton  
Administrator, Environmental Protection Agency  
Chairman, Council on Environmental Quality

**Admiral Chester R. Bender, Commandant, U.S. Coast Guard**

**Response to National Audubon Society Comments  
Contained in Letter Dated August 6, 1974**

**Comment**

We recognize that when implemented, the interim regulations passed June 28 are likely to bring about a reduction in the amount of oil pollution from tankers, and we applaud you for that small step forward. But many studies and reports make it clear that technology is now available to require greater protection of the marine environment from oil pollution by tankers and barges than the Coast Guard is now requiring in its interim regulations. The interim regulations are inadequate. As a result, the regulations will assure continuation of unnecessary oil pollution of the marine environment in normal operations, albeit to a lesser degree than now prevails. And because of the failure to require double bottoms, the regulations will assure continuation of the unnecessary threat of catastrophic pollution in event of the grounding or collision of a single tanker without a double bottom. (AUD, p. 210)

**Response**

At issue here is the question of how fast efforts to reduce or eliminate oil pollution should proceed, and whether we should have a cooperative international (slower) effort or a "go-it-alone" unilateral (faster) program.

The Coast Guard believes that U.S. participation and leadership in an international program, supplemented where appropriate with special national requirements, will be the most effective alternative in the long run and provides a reasonable protection of the marine environment.

On the basis of this belief, the Coast Guard is issuing regulations implementing provisions of the 1973 Marine Pollution Convention for U.S. tank vessels in domestic trade, with the announced intention of applying similar regulations to U.S. tank vessels in foreign trade and foreign vessels entering U.S. waters

in 1976. The Coast Guard will continue to participate in IMCO marine pollution meetings and to urge stronger international requirements where necessary and practical. Efforts to evaluate and establish appropriate national requirements which supplement and complement Convention requirements will also continue.

**Comment**

There is no indication when regulations on oil-water separating equipment and oil-content monitors will be issued. What is the anticipated date of publication of the necessary regulations? What is the anticipated date for mandatory use of the equipment? We urge that the regulations be published and made effective as soon as possible.

**Response**

It is still not possible to give a firm date for publication of regulations for oil-water separators and oil-content monitors. Work has been underway over the past year on development of test specifications and steps to provide equipment test facilities. The Coast Guard has been working with appropriate facets of the U.S. marine industry and other government agencies and also with the Marine Environmental Protection Committee of IMCO. Although the delay is frustrating, the Coast Guard feels that regulations must be based on facts and that developing and carefully testing good specifications is essential. Once specifications have been published and devices tested and approved, a better assessment can be made as to a reasonable deadline for mandatory installation and use of the equipment.

It should be pointed out, however, that many vessels are already being equipped with oily water separators to treat oily bilgewater. Most of the world's tankers are also using load-on-top techniques, most without the benefit of oil content monitors. While oil content monitors will improve and make load-on-top (or, more properly retention-on-board) easier and more effective, the improvement is small compared to the much larger improvement resulting from a tanker operator's commitment to use LOT methods at all. The greatest improvement will come from rapid

adoption of the discharge criteria contained in the 1973 Marine Pollution Convention, their entry into force as international law, and the effective enforcement of that law.

#### **Comment**

The economic consequences of requiring segregated ballast are not detailed. What would be the added cost of building segregated ballast tanks into new ships? What would the additional cost for environmental protection amount to per barrel of oil? Per gallon on gasoline to the consumer? (AUD, p. 211)

#### **Response**

The draft environmental impact statement has been revised to include a more thorough discussion of the costs of the regulations (including segregated ballast). (See pages 53-56.) Estimates of the increase in construction cost due to providing segregated ballast spaces range between 5% and 10% with increases in required freight rate of about 5% to 10%. As shown in Table 9, page 56, under the most pessimistic set of assumptions, these increased transportation costs are estimated to be less than 0.2 cents per gallon.

#### **Comment**

We find it difficult to believe that "stricter measures" of oil pollution control by the United States would be considered by foreign observers as evidence of an intent "not to abide" by the Convention. If stricter requirements for tank vessels operating in U.S. waters would be considered as evidence of intent "not to abide" by the Convention, isn't the "zero discharge" requirement for tankers that will haul oil from Valdez also an intent "not to abide" by the Convention? Is there any provision in the Convention that prohibits a nation from setting stricter standards for its own flag vessels or its own waters? (AUD, p. 213)

#### **Response**

The phrase "not to abide" used in the draft EIS was a poor choice of words. There is nothing in the Convention prohibiting

a nation from setting stricter standards for its own vessels or its own waters, and any nation doing so would certainly be "abiding" by the Convention.

The thought that we meant to convey is that there is a possibility that the 1973 Marine Pollution Convention will not be adopted and come into force worldwide. (It must be ratified by at least 15 nations which must among them control 50% of the world's gross registered tonnage.) The United States is not a "world power" in terms of shipping, but we have been a leader in international pollution control efforts. We fought hard for a stronger agreement at the 1973 Marine Pollution Conference — without our efforts the results might have been much weaker. Other nations will be looking to us to see what we are going to do — adopt and implement the Convention, or unilaterally pursue our own course of setting stricter construction standards. Because of the size and character of the worldwide tanker oil pollution problem and the results achievable through the Convention, adoption and implementation of the Convention must be the first order of business. And the actions we take must send that message to the world's major shipping nations.

The Valdez "zero discharge" standard is an operational requirement applicable to one specific loading port, which is quite a different matter from one nation setting construction standards that will prohibit or restrict certain vessels from being used in certain trades. In view of this, and since the Valdez trade is restricted to U.S. ships, the Coast Guard does not see how the Valdez requirement could affect foreign impressions of U.S. intentions. What we do about adopting and implementing the 1973 Marine Pollution Convention is very important to foreign attitudes and the fate of the Convention.

#### **Comment**

If, by imposing stricter standards, the United States or any other nation would stimulate stricter standards by other nations, we suggest that would be an excellent way to stimulate the slow-moving IMCO to greater and faster action than it has so far demonstrated. A coordinated international approach is certainly

desirable. But we should accept reality that international organizations move forward slowly and ponderously. The International Convention should be viewed as a minimum for all nations to follow, not as the maximum. And certainly the United States, which has so often proclaimed leadership in pollution control and environmental protection, and which is the free world's largest user of oil, should take the leadership in protecting the environment from pollution by oil. (AUD, p. 214)

#### **Response**

The Coast Guard feels that a coordinated international approach is both desirable and essential. We have tried to explain why, because of the nature of the tanker oil pollution problem, we feel such an approach is essential. (Please refer to pages 3 through 8.) If imposing stricter standards would inspire other nations to do the same or spur IMCO to greater and faster action, the Coast Guard would favor it. But, as indicated on page 7, the Coast Guard does not think that would be the effect of such action. The Coast Guard agrees that international organizations seem to move forward at an almost unbearably slow pace sometimes, and that the 1973 Marine Pollution Convention should be viewed as a minimum for all nations to follow. But the Convention will not even become the legal minimum standard if it doesn't come into force. We agree that the United States should take the leadership in protecting the environment from pollution by oil. The Coast Guard feels that ratification of the 1973 Marine Pollution Convention, action to implement it nationally, and encouragement of other nations to ratify it, are the best ways to demonstrate such leadership at this point in time.

(Pages 221-315 of document omitted for printing.)

#### **FIGURES**

(References to page numbers omitted in printing.)

Figure 1 The Tanker Oil Pollution Problem

Figure 2 Sources of the Estimated 1.35 Million Tons of Oil Entering the Oceans Each Year from Tankers

Figure 3 Inputs for Estimating Effects of Regulations

#### **TABLES**

Table 1 Budget of Petroleum Hydrocarbons Introduced into the Oceans

Table 2 U.S. and Worldwide Tankship Fleets

Table 3 Transportation of Oil by Water into U.S. Coastal Ports

Table 4 Estimated Annual Oil Inputs to the Oceans from Tankers

Table 5 Applicability of Requirements to U.S. Tankers in Domestic Trade

Table 6 Comparison of Oil Inputs from Tank Cleaning and Ballasting, U.S. Tankships in Domestic Trade—Amounts Presently Permitted Versus New Discharge Standard

Table 7 Expected Effects of Regulations on Oil Inputs to the Sea From U.S. Tankers

Table 8 Action Required by Regulations

Table 9 Typical Transportation Costs for Tanker Oil Shipments

Table 10 Tankship Involvements, 1969-1973, Tankships Over 3000 Deadweight Tons

Table 11 Tankship Involvements Occurring Within 50 Miles of U.S. Coastline, 1969-1973

Table 12 Description of Loss of Structural Integrity of 47 Tankship Losses, 1969-1973

(Pages 221-315 omitted in printing.)

**EXHIBIT XX**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE-JUDGE COURT

Revision Team Draft 2  
7/7/75

**INDUSTRIAL DISTRICTS**

*1.0 General Provision—Purposes:*

The purposes of the industrial sections of this ordinance are to protect industrial usage within the unincorporated areas of the County, to insure compatible land uses, to preserve the physical and social environment, and to encourage orderly development of Whatcom County.

**HEAVY IMPACT INDUSTRIAL DISTRICT (HIID)**

*1.0 Purpose:*

To establish areas and standards for industrial uses which have a heavy impact on the environment and on other land uses and to provide a protection from incompatible intrusions on these industries within the established district.

*2.0 Permitted Uses:*

2.1

Subject to the provisions of this ordinance, all uses are permitted unless specifically prohibited.

2.2

Permit required—prior to commencing construction, alteration, expansion, land preparing, or operation, each use in this district shall obtain a heavy impact industrial development permit issued by the Whatcom County Board of County Commissioners after hearings and recommendations of the Planning Commission in accordance with Section 3.0 of the ordinance; provided, however, the permit requirement of this section may be waived by the Zoning Officer if the applicant establishes with reasonable certainty that the proposed industrial use or project will meet the criteria of Section 4.0.

**3.0 Procedure:****3.1**

Application forms and consultation regarding information required for a permit may be obtained from the Zoning Officer. The application shall include an environmental assessment, an assessment of the social and economic impact of the proposed industrial use, a description of proposed buildings, machinery and processes, traffic and transportation plans, drainage and effluent disposal plans, a site plan drawn to scale, the status of any other permits applied for or expected to be required by any other governmental agency, and any other information which the applicant deems necessary to support the application or which the Zoning Officer requests. In compiling the application, the applicant should specifically address the criteria listed in Section 4.0.

**3.2**

Upon the receipt of the application, the Zoning Officer shall review the materials within fifteen days. If additional information is required from the applicant, an additional fifteen days shall be allowed for review after that information is received.

**3.3**

**Zoning Officer Evaluation**—The Zoning Officer shall evaluate the application, consulting the planning staff, governmental agencies having special expertise and, when necessary, private experts. After evaluating the application, the Zoning Officer shall declare the application exempt from the permit requirements of this ordinance as provided in Section 2.2 or refer the matter to the Planning Commission and the Board of County Commissioners for public hearings and consideration of the issuance of the heavy impact development permit.

**3.4**

**Exempt Status—Appeal**—Any decision by the Zoning Officer to exempt an application from the permit requirements of this ordinance is appealable to the Board of County Commissioners. Immediately upon declaring an application exempt, the Zoning Officer shall cause a notice of said action to be published in the official county newspaper and shall send written notice to any

person or organization which has requested in writing to be notified of such exemptions. Any person wishing to appeal that decision shall give notice of appeal to the Zoning Officer within ten (10) days. Upon receipt of said notice of appeal, the Zoning Officer shall have the matter set on the County Commissioner's calendar for the next available hearing day and notify the appellee. At the hearing, the Commissioners shall hear testimony and within five days from said hearing decide if the application is exempt or a permit required.

**3.5**

**Referral—to the Planning Commission/County Commissioners**—When the Zoning Officer determines that the application is not exempt, he shall refer the matter to the Planning Commission for public hearing. The procedure for notice and hearing shall be the same as provided for obtaining preliminary plat approval in 8.20.070 through 8.20.100 of the Whatcom County Code, except where such procedure is in conflict with specific provisions of this ordinance. The time limit for completing this procedure shall be 120 days, to commence after the completion and circulation of any draft environmental impact statement required or anticipated by any governmental agency at the time of referral of the permit application by the Zoning Officer.

**3.6**

The Planning Commission shall conduct a public hearing after the completion and circulation of any Draft Environmental Impact Statement required or anticipated at the time of referral of the permit application by the Zoning Officer. At that hearing, the Planning Commission shall consider whether the proposed use will be compatible with the criteria listed in Section 4.0 and shall make written findings and recommendations as follows, either:

- (1) That the proposed use is compatible with all of the criteria listed in Section 4 and granting of the development permit is recommended; or
- (2) That the proposed use is compatible with certain of the criteria in Section 4 but that certain deficiencies in meeting specific items exist, and that a development

- permit should be granted if appropriate modification of the application is made to correct such deficiencies; or
- (3) That the proposed use is generally incompatible with the criteria in Section 4 and recommending that the Development permit be denied.

## 3.7

**Submittal to County Commissioners** — Within ten (10) days after public hearing of the application, the Planning Commission shall make a written Planning Commission Report of its findings and recommendations with respect to the application and shall forward it to the County Commissioners.

## 3.8

**County Commissioners Procedure** — The County Commissioners shall, within thirty (30) days of the receipt of the Planning Commission Report, review such findings and recommendations of the Planning Commission at a regular public meeting, unless it then appears that a decision has been made by any governmental agency to prepare an environmental impact statement; in which case the thirty (30) days shall not commence until the completion and circulation of the statement.

## 3.8

**Ratification of Recommendations**—If the County Commissioners should approve, without change, the findings and recommendations of the Planning Commission, they shall, within ten (10) days of such meeting, issue or deny the Development Permit.

## 3.9

**Modification of Recommendations** — If the County Commissioners shall determine that modifications of the findings and recommendations of the Planning Commission are necessary, the matter shall, within ten (10) days of such meeting be referred back to the Planning Commission for further deliberation, or be set for public hearing before the County Commissioners upon due notice to the applicant and the public, such hearing to be held within thirty (30) days of such determination or within such period as agreed to by the applicant.

## 3.10

**Determination of Application—Issuance or denial of the Development Permit** by the County Commissioners shall be accompanied by written findings and a copy provided the applicant. Such action shall be taken within ten (10) days of final consideration by the County Commissioners.

*4.0 Criteria for Issuing Permit:*

## 4.1

Prior to issuing a development permit, the Board of County Commissioners shall have written recommendations regarding the following from the Planning Commission. As a precondition to granting a development permit, the Board of County Commissioners shall consider the facts and circumstances of the application, and shall make findings in writing that the applicant has established by clear and convincing evidence that the applied for use at the proposed location:

- (1) Will comply with the development standards (Section 6.0) and the performance standards (Section 7.0) specified in this ordinance.
- (2) Will be in accordance with the Whatcom County Comprehensive Plan and any laws or regulations which may be applicable.
- (3) Will not substantially interfere with the operation of existing industries in the District, and will not substantially detract from the social or natural environment beyond the boundaries of the Heavy Impact Industrial Zone.
- (4) Will be served by, or will be provided with essential utilities, facilities, and services such as highways, roads, drainage structures, electricity, water supply, sewage disposal facilities, and police and fire protection. Standards for such utilities, facilities and services shall be those currently accepted by the State of Washington, Whatcom County, or the appropriate governmental agency or division thereof.
- (5) Will not impose uncompensated requirements for public expenditures for additional utilities, facilities and services taking into consideration tax revenues generated by the industrial use, and will not impose uncompensated costs on other property owners.

- (6) Will be appropriately responsive to any Environmental Impact Statement, by weighing environmental costs along the social and economic impacts.

## 4.2

The Board of County Commissioners may impose reasonable and specific conditions precedent to establishing the use in order to protect the natural environment of the County, the neighboring industry, or the health, safety, and general welfare of the people of the County.

*5.0 Prohibited Uses:*

The following uses are prohibited in the Heavy impact industrial District:

- (1) Dwellings for human habitation except as required by an industry to conduct its primary business.
- (2) Schools, churches, hospitals, hotels, and motels.
- (3) Commercial uses except those operated by industrial users and used exclusively by their employees and guests.
- (4) Commercial recreation.
- (5) Agricultural, and private and public recreational uses, except those uses which do not involve permanent structures and which are compatible with the reasonable level of performance expected in the Heavy Impact Industrial District, provided, however.
- (6) Recreational uses operated by the industrial users primarily for their employees and guests shall not be included in this prohibition. Except with regard to pre-existing agricultural and private and public recreation uses, industry operating within the standards established by this ordinance shall not be liable for nuisance claimed by recreational and agricultural uses operating within the Heavy Impact Industrial District.
- (7) The following uses are prohibited for a period of five years from the effective date of this ordinance at which time they shall become unclassified uses:
  - (a) Deep water port facilities designed to handle ships in excess of 200,000 dead weight tons.

- (b) Metal smelting, except the alteration, improvement, reconstruction, or expansion of a building structure or process which existed prior to the enactment of this ordinance.

- (c) Nuclear power plants.

*6.0 Development Standards:*

## 6.1

The minimum lot size shall be one acre.

## 6.2

The maximum site coverage for all permanent structures shall not exceed 75% of the lot size.

## 6.3

Any permanent structure shall be at least 50 feet from the nearest property line; 200 feet from any adjacent non-industrial zoning district; and 100 feet from any public right-of-way, provided that fences shall be allowed to be placed on property lines which are not adjacent to public right-of-ways and ten feet from property lines adjacent to public right-of-ways so long as no traffic hazards are created.

## 6.4

The building setback requirements of subsection 6.3 shall be increased by one (1) foot for every foot by which the structure shall exceed 50 feet in height.

## 6.5

Users shall be responsible for maintaining an orderly appearance of all properties and shall be responsible for assuring the care and maintenance of any natural growth where appropriate.

## 6.6

Loading areas must be located in such a manner that no loading, unloading, and/or maneuvering of trucks associated therewith takes place on public rights-of-way.

*7.0 Performance Standards.*

*7.1*

Each industrial use is required to continuously employ the best pollution control and nuisance abatement technology reasonably and practicably available for that particular industry; provided however where federal or state law provides for the level of technology to be employed, the federal or state standard shall apply.

*7.2*

**Heat, Glare and Light:** All operations and facilities producing heat, glare, or light, including exterior lighting, shall be directed or shielded by a wall or fence so that heat, glare, or light is not reflected so as to unreasonably infringe upon the use and enjoyment of adjacent property.

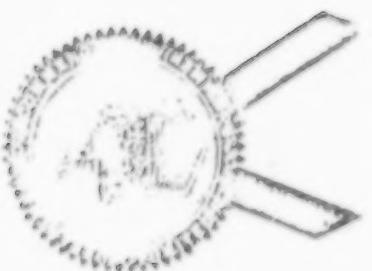
*7.3*

**Vibration:** No vibration other than that caused by highway vehicles and trains shall be permitted which is discernible without instruments at or beyond the property line for the use concerned.

*7.4*

**Odors:** No odors shall be emitted that are detectable at or beyond the property line for the use concerned in such concentration or of such duration as to cause a public nuisance or threaten health or safety or so as to unreasonably infringe upon the use and enjoyment of adjacent property.

**EXHIBIT BBB**



**Certificate of Approval**

The City of Rockingham has developed a program for the effective management, control and use, reduction and development of its industrial and service works, has been approved under the terms of the Contract Zone Management Plan of 1973/PL 92-360, as amended, by the State of North Carolina Board of Control, the  
Board of Control, State of North Carolina Board of Control, the  
Contract Zone Management Plan, as revised, for the  
Contract Zone Management Plan, as revised, for the

Washington Salt Industrial and Management Program

and executed the date for having  
the plan's contract zone in the Industrial  
Zone, the  
Date:

*H. C. Jones  
Pat Gandy  
John Gandy*

*Mark R. Johnson*

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
THREE-JUDGE COURT

**STATE COASTAL ZONE MANAGEMENT PROGRAM**

The Coastal Zone Management Act of 1972 (Public Law 92-583), as amended, hereinafter the CZMA, authorizes the Secretary of Commerce to make annual grants to any coastal state for costs of administering the state's management program, if he approves the program in accordance with subsection 306(c) of the CZMA.

The functions of the Secretary of Commerce under the CZMA have been delegated to the Administrator of the National Oceanic and Atmospheric Administration (NOAA) under Department of Commerce Organization Order 25-5A. The functions have in turn been redelegated to the Assistant Administrator of NOAA for Coastal Zone Management under Department of Commerce Organization Order 25-5B.

Section 306(c), (d) and (e) of the CZMA require that certain findings be made by the Secretary of Commerce prior to approval of a state management program. The Assistant Administrator for Coastal Zone Management, acting for the Secretary, hereby sets forth the findings on the Washington Coastal Zone Management Program (WCZMP). These findings should be understood as constituting only part of the other review, comment, participation and technical requirements of the CZMA that have been met by the WCZMP through its planning processes. Demonstration that these and other requirements of the CZMA have been met are contained in the state's program document, formal amendments to that document and the final environmental impact statement (FEIS) on the WCZMP prepared by the Office of Coastal Zone Management, dated April 9, 1976. These documents are referenced in the following findings, as appropriate.

**FINDINGS PURSUANT TO SECTION 306(c) OF THE CZMA:**

(1) The State of Washington has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Office of Coastal Zone Management on behalf of the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, public and private, which is adequate to carry out the purposes of the Coastal Zone Management Act and is consistent with the policy declared in section 303 of the Coastal Zone Management Act.

The opportunity for full participation by all interested parties is afforded by the state laws that make up the WCZMP, their implementing guidelines and regulations and the local planning processes that have been operating since 1972. The basic policy of Washington's Shoreline Management Act of 1971 (SMA) for public participation parallels the national legislation and reads, in relevant part: "... \* \* that all persons and entities having an interest in the guidelines and master programs developed under this chapter are provided with a full opportunity for involvement in both their development and implementation (and) the department and local governments shall \* \* \* not only invite but actively encourage participation by all persons and private groups and entities \* \* \*"

In response to the CZMA, the WCZMP administered by the Department of Ecology (DOE) in conjunction with other state agencies and participating local governments, was subjected to two extensive formal reviews by all relevant regional and headquarters Federal agencies from March 1975 through May 1975 and again, from December 1975 through February 1976. In addition, the WCZMP was distributed for local and national review under the terms of the National Environmental Policy Act in the form of a draft environmental impact statement in March 1975, and a final environmental impact statement in April 1976. Documentation of these processes is found in Chapter V and Appendix I of the program document and Chapter X and Appendix X of the FEIS.

All serious disagreements raised by Federal agencies have been satisfactorily addressed in the WCZMP, as amended. The first year work program after approval is also designed to respond to many constructive recommendations made by Federal agencies and other reviewers.

The work programs involved in the development of the WCZMP have been routinely subjected to local, areawide and state reviews under the provisions of Title IV of the Intergovernmental Cooperation Act of 1968 and Office of Management and Budget (OMB) Circular A-95.

The basic purpose of the Coastal Zone Management Act is to enhance the ability of the states and local governments, in cooperation with the Federal Government, to manage the land and water resources of the coastal zone. The broadest statement of Congressional purpose is the preamble to the Act: "To establish a national policy and develop a national program for the management, beneficial use, protection, and development of the land and water resources of the Nation's coastal zones \* \* \*" Key supporting purposes include: (a) encouraging the states to exercise their full authority over the lands and waters in the coastal zone; and (b) developing programs that unify policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

The WCZMP meets the test of comprehensiveness set forth in the CZMA's preamble. The basic authority for coastal management of the state, the SMA, declares in relevant part that there is " \* \* \* a clear and urgent demand for a planned, rational and concerted effort, jointly performed by Federal, state and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines \* \* \*" This is to be accomplished by "planning for and fostering all reasonable and appropriate uses," to " \* \* \* recognize and protect the statewide interest over local interest," to "preserve the natural character of the shoreline" and "result in long-term over short-term benefit." The State Environmental Policy Act (SEPA), Environmental Coordination Procedures Act (ECPA), and the twenty regulatory authorities residing within

DOE provide further evidence that a broad range of uses can be controlled and guided in conformance with the SMA mandate.

The "full authority" of the State of Washington to manage the beneficial use, protection and development of its coastal land and water resources in a coordinated fashion is described in Chapters III and V of the program document.

Techniques to unify policies, criteria, standards, methods and processes are an integral part of the WCZMP. SEPA and ECPA are broad mandates in the State of Washington for environmental policy disclosure, evaluation and unification. The SMA and its implementing guidelines and regulations set state standards for local master program development and adherence to its policies by all public and private parties. The state's Department of Ecology (DOE), the lead agency under the SMA, has clarified and described its internal processes to unify its administrative planning and regulatory functions. A system of interagency commissions and boards provide a means for DOE input to interagency decision-making and also for citizen overview of DOE's programs. Finally, the Natural Resources Cabinet, chaired by the Governor, acts as the highest executive body to deal with the unification of state policies, including those that are essential to the integrity of the WCZMP.

(2) The State of Washington has:

(a) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the state's management program was submitted to the Office of Coastal Zone Management, which plans have been developed by a local government, an areawide agency designated pursuant to regulations established under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, and regional agency, or an interstate agency.

Coordination between the WCZMP and other relevant plans is assured by the same processes as outlined in (1) above. The most specific assurance of coordination with local and areawide plans is contained in the SMA and its implementing guidelines which call for local master programs to consider "all plans, studies,

surveys, inventories and systems of classification made or being made by Federal, state, regional or local agencies." Further, all such WCZMP plans are subject to clearinghouse review under OMB Circular A-95. The WCZMP has been coordinated with other relevant plans existing in the state at the time it was submitted for approval. Examples of how the WCZMP has coordinated with all applicable plans are documented in Appendix IX of the FEIS.

(b) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (5) of subsection 306(c) of the CZMA and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of such local governments and agencies in carrying out the purposes of the CZMA.

The WCZMP makes specific provision for continuing consultation with the above agencies and also with affected Federal agencies in Chapter VI of the program document. During program administration the WCZMP has committed itself to full consultation and coordination with Federal agencies and has adopted specific operational guidelines for this interaction as part of its formal amendments. The SMA and DOE guidelines set forth the basis for consultation during local master program review, changes and refinements to such programs, and multijurisdictional coordination. Program coordination objectives that form the basis of the state's first year administrative grant and work program contain specific proposals for strengthening and maintaining interagency and intergovernmental participation in the future.

(3) The State of Washington has held public hearings in the development of the management program.

As indicated above, the WCZMP was established through the SMA, beginning in 1971. Hearings were held for the SMA itself, as well as for all the regulations and local master programs as required by the Administrative Procedures Act of Washington (RCW Chapter 34.04). Additionally, a joint NOAA/DOE hearing on the entire proposed program was held on April 22, 1975, following press notification and individual invitations. The

following table shows the hearing dates for the chapters of the Washington Administrative Code implementing the SMA:

- Chapter 173-14 Permits for Substantial Development on Shorelines of the State:  
December 1971, in Olympia
- Chapter 173-16 Shoreline Management Act Guidelines for Development of Master Program:  
March 21, 1972, in Spokane  
March 23, 1972, in Olympia  
June 20, 1972, in Olympia
- Chapter 173-19 State Master Program:  
October 15, 1974, in Spokane  
October 23, 1974, in Olympia
- Chapter 173-18 Shoreline Management Act — Streams and Rivers Constituting Shorelines of the State;
- Chapter 173-20 Shoreline Management Act — Lakes Constituting Shorelines of the State; and
- Chapter 173-22 Adoption of Designations of Wetlands Associated with Shorelines of the State (all heard together):  
June 28, 1972, in Olympia

(4) The State of Washington management program and any changes thereto have been reviewed and approved by the Governor.

On December 12, 1975, Governor Daniel J. Evans, approved the WCZMP and certified that it met the requirements of the CZMA. On March 29, 1976, in response to comments from Federal agencies and others on matters requiring clarification and modification in the December 12 program document, Governor Evans approved and transmitted to OCZM several amendments and modifications to the WCZMP.

(5) The Governor of Washington has designated a single agency to receive and administer the grants for implementing

*Exhibit BBB*

the management program required under paragraph 306(c)(1) of the CZMA.

In his letter of December 12, 1975, approving the WCZMP, Governor Daniel J. Evans certified that:

"The Department of Ecology is the single designated agency to receive and administer grants for implementing the coastal zone management program, and further, the Department of Ecology is hereby designated as the lead agency for the implementation of the coastal zone management program."

(6) The State of Washington is organized to implement the management program required under paragraph 306(c)(1) of the CZMA.

The state is organized to implement the management program through several state, local and areawide agencies, with DOE assigned the central point of administrative responsibility. The DOE, which aggregates under one department the majority of the most important environmental regulations of the state, is also the lead agency for implementation of the program.

A Shoreline Hearings Board has been established by the SMA as the final administrative arbiter relative to decisions made under this primary coastal zone control mechanism.

Several other state agencies and boards have major management responsibilities in the coastal zone and are an integral part of the state's coastal management structure. Chapter III of the WCZMP document demonstrates that the roles, responsibilities and organizational arrangements for administration of the program are adequate. The first year administrative grant application commits adequate staff resources in DOE, local governments, and in other state and regional agencies to insure that the managerial structure of the program will function in the manner described in the WCZMP.

Counties and municipalities in Washington's coastal zone are organized to administer the management program through the preparation and administration of local master programs and local

*Exhibit BBB*

police power regulations and controls, in accordance with the SMA policies and DOE guidelines.

The SMA provides the principal organizational linkage between the DOE, as lead agency, and other state, regional and local government agencies. Section 90.58.280 of the SMA provides that:

"The provisions of this Chapter (1971 ex. c286 Sec. 28) shall be applicable to all agencies of state government, counties, and public and municipal corporations and to all shorelines of the state owned or administered by them."

The SMA also provides that the lands within the jurisdiction of such agencies and "adjacent to the shorelines of the state" are to be managed consistently with the policies of the Act, the guidelines, and the master programs for the shorelines of the state. Therefore, the organizational management structure is pervasive in the coastal zone.

The Governor certified on December 12, 1975 that:  
"The state has established, and is operating the necessary organizational structure to implement the coastal zone management program."

(7) The State of Washington has the authorities necessary to implement the program, including the authority required under subsection 306(d) of the CZMA.

Washington's SMA and other existing authorities of the state, such as the State Environmental Policy Act and Environmental Coordination Procedures Act, provide it with the authorities necessary to implement the program. The description of authorities is set forth subsequently under the findings pursuant to Section 306(d) for clarity of presentation.

(8) The State of Washington management program provides for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature.

The WCZMP and its related state structure of policies and authorities establish a reasoned means to consider the national

interest in the siting of facilities of local as well as national importance. The state program neither arbitrarily excludes nor unreasonably restricts the siting of such facilities. Rather, the management program addresses the national interest in a positive manner. This is accomplished primarily through the open planning processes establishing the shoreline program, the appeals process available through the Shorelines Hearing Board and the checks, balances, and procedures associated with the Forest Practices Act, the Thermal Power Plant Site Evaluation Council, water and air quality standards, and related programs.

The DOE guidelines give priority to ports and water related industrial uses, and require that local master programs consider the regional and statewide needs for such uses.

Extensive input of national concerns and interests was assured by the Federal agency participation, consideration of their views and review processes mandated by the CZMA and set forth in the program document, as amended. The range of interests expressed by various Federal agencies has ranged from foreseeable needs to meet national security emergencies, through siting of energy facilities in undeveloped areas, to stringent requirements to enhance living marine resources and protect natural habitats. Partly in response to these interests, the state has established a process for identification of areas which are of particular concern to both the state and to the Nation, and has acknowledged that it is the primary objective of coastal zone management to deal openly with needs and conflicts — including those stemming from national perspectives — in the implementation of its program.

(9) The State of Washington management program makes provision for procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological or esthetic values.

The SMA and its implementary guidelines provide the basis for designating "natural" and "conservancy" shoreline environments the purposes of which are to protect and carefully manage natural features, the ecology of the shoreline, scenic vistas,

esthetics, fisheries and wildlife. Other mandatory elements of local programs include specific provisions for dealing with archaeological areas and historic sites and recreational uses of the shorelines. These procedures for designating specific areas are guided by state policy and DOE guidelines to minimize manmade intrusions on shorelines, to restore developed areas, to promote esthetic values, to protect water systems, to provide access to public beaches and to accommodate other recreational facilities, wherever possible.

The state procedure for identifying areas of particular concern, set forth in Chapter I of the program document, also provides a process within which specific areas of environmental or development significance can be identified. Ten areas of particular concern have been identified for priority management attention in the WCZMP.

The state is actively seeking support for acquisition of an estuarine sanctuary for ecological research and protection purposes as provided for in Section 312 of the CZMA.

Other programs and authorities of the state serve to further the purposes of this finding, especially the natural areas acquisition and maintenance program of the Department of Natural Resources, the state's historic preservation program and the acquisition program of the Parks and Recreation Commission.

#### **FINDINGS PURSUANT TO SECTION 306(d) OF THE CZMA:**

The State of Washington, acting through its chosen agency or agencies, including local governments, areawide agencies designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, regional agencies, or interstate agencies, has authority for the management of the coastal zone in accordance with the management program.

(1) Such authority includes power to administer land and water use regulations, control development in order to ensure

compliance with the management program, and to resolve conflicts among competing uses.

The SMA requires and defines a planning program and a regulatory permit system, both of which are developed at the local level under state policy, guidance, review and approval. The planning program for each local government consists of a comprehensive shoreline inventory and a master program for the regulation of shoreline uses. Under the SMA, the local planning process is conducted in conformance with state guidelines prepared and adopted by DOE that are in force during the planning process. These guidelines and regulations serve as the basis for state review and approval of local master programs and form a key element for the implementation of the WCZMP. The regulatory system is overseen by DOE as set forth in the SMA. The SMA sets forth policy direction and specific priorities, and DOE and local governments are directed to give preference to uses in a prescribed order of priority.

Land and water-use regulations and compliance with the management program apply within two designated tiers of the state's coastal zone. The first tier, or "resource boundary," encompasses the marine shorelines of the state and associated wetlands, including at a minimum all upland area 200 feet landward from the ordinary high water mark, and the upstream shorelines to the limit of saltwater intrusion under direct SMA control. The second tier or "planning and administrative boundary" includes relevant additional areas in the state's coastal counties the uses of which may directly and significantly affect the lands and waters within the "resource boundary."

Uplands adjacent to the jurisdiction of the SMA are to be managed on a basis that is consistent with the policies of SMA. The SMA directs that the provisions thereof shall be applicable to all agencies of state government, counties, and public and municipal corporations and to all shorelines of the state owned or administered by them. It also directs all state agencies, counties, and public and municipal corporations to review administrative and management policies, regulations, plans and ordinances relative to lands under their respective jurisdiction adjacent to the

shorelines of the state so as to achieve a use policy on said lands consistent with the policy of the SMA.

The SMA also authorized DOE to develop recommendations for land use control for such lands, and directs local governments, in developing use regulations for such areas, to take into consideration any recommendations developed by DOE, as well as any other state agencies or units of local government.

Outside of the "resource boundary" and its adjacent uplands, the WCZMP has developed coordination arrangements among local and state agencies and their authorities to assure the integrity of the management program.

(2) The State of Washington's authority also includes power to acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

DOE is empowered by the SMA to acquire lands and easements when necessary to achieve implementation of local master programs. Also, the Departments of Ecology, Natural Resources, and Game, and the Parks and Recreation Commission have additional authorities to acquire land. Taken together, these authorities are sufficient to achieve conformance with the WCZMP.

#### **FINDINGS PURSUANT TO SECTION 306(e) OF THE CZMA:**

(1) The State of Washington provides for a combination of the following general techniques for control of land and water uses within the coastal zone:

(a) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;

(b) Direct state land and water use planning and regulation; and

*Exhibit BBB*

(c) State administrative review for consistency with the management program for all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

The primary technique for land and water use control in the WCZMP involves that set forth in (a) above, with the focal point being in DOE on behalf of the state as provided in the SMA. The SMA enunciates state policies for the shorelines of the state and gives preference to and sets priorities for uses of shorelines. In accordance with these policies, DOE has promulgated guidelines for local implementation through local master programs and established criteria and standards for use activities. These policies and guidelines apply to land and water uses and resources affecting state waters and shorelines within the resource boundary, as well as those shorelines within the planning and administrative boundary.

DOE reviews and approves local master programs for conformance to their policies and guidelines. Both DOE and the Attorney General review plans and permits for development in and adjacent to the shoreline areas and can ensure conformity through appeal to the Shoreline Hearing Board or the courts. The SMA requires administrative review by DOE of all variances from adopted local master programs, with power to approve or disapprove each variance residing in the DOE.

As the lead coastal zone management agency of the state, DOE will exercise its full range of regulatory authorities other than the SMA to ensure conformance with the WCZMP. DOE will also exercise its review and coordination responsibilities under the State Environmental Policy Act for the same purposes. The interagency authorities and arrangements cited in Chapter III and elsewhere in the program document will be applied in a coordinated fashion to achieve the broader objectives of the WCZMP.

(2) The State of Washington program also provides for a method of assuring that local land and water use regulations

*Exhibit BBB*

within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit.

The following provides evidence that the state has met the above requirement: The SMA declares use priorities for shorelines of state significance to which the local governments "shall give preference" and "recognize and protect the statewide interest over local interest."

The state program neither arbitrarily excludes nor unreasonably restricts uses of regional benefit. The methods for assuring this are through the open planning process establishing the shoreline program, the appeals process available through the Shorelines Hearing Board, recognition of the statewide over local interests with respect to shorelines of statewide significance, and the checks, balances and procedures associated with the Forest Practices Act, Thermal Power Plant Site Evaluation Council, water and air quality standards, and other authorities cited in the program document.

A review of the aggregated local master programs submitted to DOE concludes that there appear to be no unreasonable restrictions or exclusions in these programs. Where uses are restricted or controlled, these restrictions are based upon defined and prudent criteria.

Having made the findings set forth above, and having determined that the Washington State Coastal Zone Management Program meets the requirements of the Coastal Zone Management Act of 1972 (Public Law 92-583), as amended, and its implementing regulations, the program is hereby approved on behalf of the Secretary of Commerce.

Dated: June 1, 1976

/s/

Robert W. Knecht  
Assistant Administrator for  
Coastal Zone Management,  
NOAA

AFFIDAVIT

CITY OF WASHINGTON )  
                      ) ss:  
DISTRICT OF COLUMBIA )

ROBERT W. KNECHT, being first duly sworn, deposes and says:

1. That he is the Assistant Administrator of the National Oceanic and Atmospheric Administration (NOAA) for Coastal Zone Management.
2. That, acting in that capacity, he approved the Washington State Coastal Zone Management Program, pursuant to section 306 of the Coastal Zone Management Act of 1972 (Public Law 92-583, 16 U.S.C. 1451) on June 1, 1976.
3. That the Coastal Zone Management Act of 1972, hereinafter the CZMA, authorizes the Secretary of Commerce to make annual grants to any coastal State for the costs of administering the State's coastal zone management program, if he approves the program in accordance with subsection 306(c) of the CZMA.
4. That the functions of the Secretary of Commerce under the CZMA have been delegated to the Administrator of NOAA under U.S. Department of Commerce Organization Order 25-5A. The functions have been in turn redelegated to the Assistant Administrator of NOAA for Coastal Zone Management under U.S. Department of Commerce Organization Order 25-5B.
5. That when he approved the Washington State Coastal Zone Management Program on June 1, 1976, he did not approve Chapter 125 of the 1975 laws of the State of Washington, enacted as Substitute House Bill No. 527 (the "Tanker Law"), as being a part or component of the Washington Coastal Zone Management program.

**FURTHER AFFIANT SAYTH NOT.**/s/

**ROBERT W. KNECHT**  
*Assistant Administrator*  
*National Oceanic and*  
*Atmospheric Administration*

Subscribed and sworn to before  
me this 17th day of June, 1976

BETTY C. BARAN  
*Notary Public in and for*  
*the District of Columbia*

My Commission expires August 14, 1977.

*Coast Guard Memorandum*

**COAST GUARD MEMORANDUM**  
**UNITED STATES DISTRICT COURT**  
**WESTERN DISTRICT OF WASHINGTON**  
**THREE-JUDGE COURT**

**UNITED STATES GOVERNMENT MEMORANDUM**  
**DEPARTMENT OF TRANSPORTATION**  
**UNITED STATES COAST GUARD**  
**G-LMI/81**  
**5860**  
**U.S. COAST GUARD**  
**JUL 14, 1975**  
**WASHINGTON, D.C.**  
**MERCHANT VESSEL PERSONNEL**

July 10, 1975

**SUBJECT:** State of Washington Bill No. 527, enacted 29 May  
1975

**FROM:** Chief Counsel

**TO:** Chief, Office of Merchant Marine Safety

1. In an effort to reduce the danger of oil spills in certain congested areas the State of Washington has legislated a law requiring "all" oil tankers—i.e., those U.S. tankers registered in the foreign trade, all foreign tankers, and all U.S. tankers enrolled in the coastwise trade, of 50,000 DWT or greater—to employ a Washington State licensed pilot while navigating in Puget Sound and adjacent waters. Subject Act also prohibits oil tankers greater than 125,000 DWT from operating in certain areas, and prohibits oil tankers of 40,000 to 125,000 DWT from operating in certain areas unless they either satisfy enumerated standard safety features or are under the escort of tugs meeting specified

*Coast Guard Memorandum*

requirements. The Act directs studies related to vessels carrying other potentially hazardous materials.

2. I believe that the subject matter of the Act is preempted by federal law, and imposes an unreasonable restriction upon interstate commerce in contravention of the Commerce Clause, Art. I, Clause 3 of Section 8. It is also in conflict with federal statutory authorities which provide for the development of international maritime standards within the framework of IMCO, thereby seriously interfering with the Executive authority in Foreign Affairs.

3. While Congress has left to the States the regulation of pilotage in the bays, inlets, rivers, harbors and ports of the several states \* \* \* until further provision is made by Congress \* \* \* (46 U.S.C. 211), it has also required that "every coastwise seagoing steam vessel subject to the navigation laws of the United States \* \* \* (i.e., all coastwise vessels subject to the inspection by the Coast Guard) not sailing under register, shall, when underway, except on the high seas, be under the control and direction of pilots licensed by the Coast Guard." (46 U.S.C. 364). Although " \* \* \* title 52 of the Revised Statutes shall [not] be construed to annul or affect \* \* \* the laws of any State, requiring vessels entering or leaving a port in any such State \* \* \* to take a pilot duly licensed or authorized by the laws of such State \* \* \* " (16 U.S.C. 215), the limitation does not apply to coastwise steam vessels. (Id.) These statutes have been consistently construed to mean that a State cannot require pilotage on an American inspected vessel on a coastwise voyage unless it is sailing under register. This has recently received support in the enactment of the Ports and Waterways Safety Act, P.L. 92-340, July 10, 1972 wherein Congress again recognized the right of a State to require pilots on self-propelled vessels engaged in the *foreign trades* while leaving pilotage requirements for coastwise vessels under federal jurisdiction. See Section 101(5). (Emphasis added.)

4. The Supreme Court has interpreted the Supremacy Clause (Article VI) of the U.S. Constitution as providing the necessary vehicle for federal pre-emption of state laws in which there is

conflict. The federal government has long been tasked with the responsibility to regulate maritime safety. With the passage of the Ports and Waterways Safety Act of 1972, P.L. 92-340, in July 1972 the federal government, through the Coast Guard, has broadened maritime safety authority to affirmatively include environmental considerations in addition to safety aspects. The purpose of the PWSA is to promote the safety and environmental quality of our ports, waterfront areas and the navigable waters of the U.S. — exactly what the Washington Act proposes to do. Specifically, §201 of the PWSA tasks the Coast Guard with the responsibility of establishing design and construction criteria for vessels, including oil tankers. The State of Washington's attempt to impose standard safety features on certain oil tankers (Sec. 3(2)(a)-(e)) is violative of the preemption doctrine. *Kelly v. State of Washington*, 302 U.S. 1 (1937) recognized that state structure and equipment requirements on vessels would be preempted by the necessity for uniform federal regulation. Further the prohibition of oil tankers greater than 125,000 DWT from entering Puget Sound, and the tug escort requirements, are also violative of the preemption doctrine. House Report No. 92-563 accompanying H.R. 8140 at page 8 recognized the need for uniform federal regulation in maintaining vessel traffic services and systems for ports, harbors, and other waters subject to congested traffic. *Burbank v. Lockheed Air Terminal*, S ERC 1321 (U.S. 1973) supports this preemption conclusion. The Court recognized that, even though intended to protect the local area from noise pollution, federal control over air commerce preempted the City of Burbank's ordinance prohibiting jet airplanes from landing at the Hollywood-Burbank Airport between 11 P.M. and 7 A.M. the next day. Likewise, comprehensive federal control over maritime commerce preempts Washington's legislation.

5. The Washington Act is also unconstitutional because it creates an undue burden on interstate commerce (ISC). The standard safety feature requirements unduly burden ISC. Compare with *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (state law limiting the length of railroad cars created an undue burden on ISC); and *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (state law requiring mud flaps on all trucks operating in the state created an undue burden on ISC.).

Distinguish *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1959) which upheld Detroit's smoke abatement ordinance because it did not create an undue burden on ISC (and was not preempted by Federal regulation). However, note that the ordinance did not impose structural requirements for vessel's boilers. Nor is *Askev v. American Waterways Operators*, 411 U.S. 1325 (1973) dispositive. The Court avoided deciding whether the provision of the Florida Act requiring containment gear impermissibly invaded a subject requiring uniform federal regulation. Concerning the prohibition from entry and tug escort requirements, though preemption is the most persuasive argument for invalidating these provisions, I believe they also would create an undue burden on ISC — they would impede the free movement of both interstate and foreign waterborne commerce.

6. Another major area of concern with the Act is the effect it will have on the efforts of the U.S. to achieve internationally acceptable marine safety and environmental protection standards. The elaboration of Solas 74 and the 1973 Marine Pollution Convention are recent examples of the actions taken to provide a system of equality which will not unduly burden commerce. Congress has, recognized the impracticality of local unilateral action creating systems of inequalities by mandating, in Section 201(7) of PWSA, 46 USC 391a(7), a requirement of equality consonant with international treaties, conventions, or agreements for the protection of the marine environment.

7. In view of the broad statutory and regulatory power of the Federal Government, acting through the Coast Guard, in all fields related to maritime and environmental safety, there can be no doubt that the field encompassed by the Act of the State of Washington is federally preempted. The Act is also constitutionally void because it would create an undue burden on interstate commerce.

/s/

R. A. RATTI

Copy to:  
G-W

**AFFIDAVIT OF BYRON E. MILNER  
IN SUPPORT OF PLAINTIFF  
ATLANTIC RICHFIELD COMPANY'S  
MOTION FOR PERMANENT INJUNCTION IN  
SUPPORT OF DECLARATORY JUDGMENT**

(Caption, and names, addresses, and telephone numbers of attorneys omitted in printing.)

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

No. C 75-648  
(Three Judge Court)

STATE OF CALIFORNIA )  
                        ) ss.  
COUNTY OF LOS ANGELES )

I, BYRON E. MILNER, having been duly sworn, do depose and say that:

1. I am employed by Atlantic Richfield Company as Vice President of Supply and Coordination. In this capacity I am responsible for the supply of crude oil to the Atlantic Richfield Cherry Point Refinery in the State of Washington, which includes the scheduling of tankers for this purpose.

2. During the next 10 weeks, 11 tankers have been scheduled to arrive at Cherry Point with crude oil on or about the dates set forth in Exhibit A attached hereto. As indicated in Exhibit A, all such tankers are larger than 40,000 deadweight tons (DWT) and therefore subject to § 3(2) of the Washington Tanker Law.

3. In 1973 there were 4 (four) tankers larger than 125,000 DWT which unloaded at the Cherry Point Refinery dock; in 1974, there were 3 (three); and in 1975, from January to September, 5 (five).

4. During the period from September 8, 1975, when the Tanker Law became effective, to September 24, 1976, Atlantic Richfield, in compliance with § 3(1) of the Tanker Law, scheduled no tankers larger than 125,000 DWT to arrive at the Cherry Point dock.

5. Atlantic Richfield plans to resume the scheduling practices in effect prior to the enactment of the Tanker Law; hence, I expect that, if permitted to do so, approximately five to eight tankers larger than 125,000 DWT will arrive at the Cherry Point Refinery dock in the next twelve months. As indicated in Exhibit A, the first such tanker is presently scheduled to arrive on November 25, 1976.

6. I have read the foregoing affidavit and declare it to be true and correct to the best of my knowledge, information and belief.

/s/

BYRON E. MILNER

Sworn to and subscribed before  
me this 28th day of September,  
1976.

/s/ Isabel T. Urquiza

Notary Public in and for the  
State of California

**EXHIBIT "A"**

The following tankers have been scheduled to arrive at the Cherry Point Refinery dock on or about the dates set forth:

Date of Arrival	Name	DWT (000)
9/30/76	Jaglella	120
10/1/76	Takatorisan	120
10/7/76	Ronacastle	125
10/15/76	Eul Delmar	116
10/19/76	White Peony	86
11/5/76	Archon	122
11/6/76	Santa Augusta	84

11/7/76	Polyxene "C"	122
11/25/76	(to be chartered)	Between
		125 and 150
12/7/76	Sea Queen	122
12/9/76	(to be chartered)	Less than
		125

**AFFIDAVIT OF HERBERT H. ZACHOW  
IN SUPPORT OF  
PLAINTIFF ATLANTIC RICHFIELD COMPANY'S  
MOTION FOR PERMANENT INJUNCTION  
IN SUPPORT OF DECLARATORY JUDGMENT**

(Caption, and names, addresses, and telephone numbers of attorneys omitted in printing.)

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

No. C 75-648  
(Three Judge Court)

STATE OF CALIFORNIA      }  
                                }ss.  
COUNTY OF LOS ANGELES    }

I, HERBERT H. ZACHOW, having been duly sworn, do depose and say that:

1. I am employed by Atlantic Richfield Company as Manager of Crude and Product Supply. In this capacity I am responsible for the supply of crude oil to the Atlantic Richfield Cherry Point Refinery in the State of Washington, which includes the scheduling of tankers for this purpose.

2. This affidavit is designed to supplement the September 28, 1976 affidavit of Byron E. Milner by updating the information contained therein.

3. During the next seven (7) weeks, six (6) tankers have been scheduled to arrive at Cherry Point with crude oil, on or about the dates set forth in Exhibit A attached hereto. As indicated in Exhibit A, all such tankers are larger than 40,000 deadweight tons (DWT) and therefore subject to §3 of the Washington Tanker Law. As further indicated in Exhibit A, the first such tanker larger than 125,000 DWT is presently scheduled to arrive on December 7, 1976.

4. During the period from September 24, 1976, to the present, Atlantic Richfield Company, in compliance with §3(2) of the Washington Tanker Law, has received five (5) tankers at its Cherry Point refinery as set forth in Exhibit B attached hereto.

5. I have read the foregoing affidavit and declare it to be true and correct to the best of my knowledge, information and belief.

/s/

HERBERT H. ZACHOW

Sworn to and subscribed before  
me this 11th day of November,  
1976.

/s/ Gerry Jones

Notary Public in and for the  
State of California

**EXHIBIT A**

Arrival Date	Vessel	DWT (000)
11-23-76	Archon	122
11-27-76	Santa Augusta	84
12-7-76	Overseas Argonaut	139
12-15-76	Fairbanks	120
12-17-76	Sea Tiger	120
12-28-76	Independence	150

**EXHIBIT B**

Arrival Date	Vessel	DWT (000)
9-29-76	Jaglella	120
10-4-76	Takatorisan Maru	120
10-16-76	Ronacastle	125
10-21-76	White Peony	86
10-26-76	Eulalia Delmar	116

**ORDER SUSPENDING PROCESSING OF  
APPEALS TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

(Caption, and names, addresses, and telephone numbers of attorneys omitted in printing.)

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CIVIL No. C-75-648-M  
(Three Judge Court)

Good cause appearing therefor by the motion of the State of Washington defendants, Daniel J. Evans, et al.,

IT IS HEREBY ORDERED that all further processing of the appeals to the United States Court of Appeals for the Ninth Circuit, initiated by two documents entitled "Notice of Appeal" filed with this Court by defendants and intervening defendants on October 21, 1976, and the other entitled "Notice of Appeal to the United States Court of Appeals for the Ninth Circuit" filed with this Court on November 23, 1976, and related to the Judgment and Orders dated and entered by this Court on September 23 and 24, 1976, and November 12, 1976, is suspended pending completion of an appeal to the United States Supreme Court initiated by defendants through the filing of a "Notice of Appeal to the Supreme Court of the United States" with this Court on November 19, 1976.

DATED this 1st day of December, 1976.

/s/ Walter T. McGovern

UNITED STATES DISTRICT JUDGE

**OPINION AND ORDER ON  
APPLICATION OF STAY**

**SUPREME COURT OF THE UNITED STATES**

**No. A-456**

DANIEL J. EVANS, GOVERNOR OF  
WASHINGTON, ET AL.,

*Applicant.* On Application  
of Stay

vs.  
ATLANTIC RICHFIELD COMPANY ET AL.

[December 9, 1976]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants, officials of the State of Washington, seek a stay of the order of the United States District Court for the Western District of Washington, entered November 12, 1976, enjoining enforcement of Chapter 125 of the Laws of the State of Washington, 1975, First Extraordinary Session, Rev. Code Wash. § 88.16.170 *et seq.* This statute, designed "to decrease the likelihood of oil spills on Puget Sound and its shorelines," imposes regulations on oil tankers over 40,000 deadweight tons ("DWT")\* and prohibits "supertankers" of over 125,000 DWT. On the date the statute became effective, September 8, 1975, respondents filed suit in the United States District Court for the Western District of Washington, claiming that Chapter 125 had been preempted by federal law, particularly the Ports and Waterways Safety Act of 1972 ("PWSA"), 33 U. S. C. § 1221 *et seq.*, 46 U. S. C. § 391a, and that Chapter 125 imposed an undue burden on interstate commerce, in violation of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. A three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284, the case was heard pursuant to an agreed statement of facts, and an opinion was issued on September 23, 1976, holding Chapter 125

\*Tankers between 40,000 and 125,000 DWT may enter Puget Sound (a) if they contain certain enumerated safety features or (b) if they are accompanied by a tug escort. Tankers over 50,000 DWT are required to have State licensed pilots on board when navigating Puget Sound.

pre-empted in its entirety: the State pilotage requirement by conflict with 46 U. S. C. §§ 215 and 364, and the remainder of Chapter 125 by the PWSA. On motion by respondents a permanent injunction was issued on November 12, 1976, but that order was stayed until December 15, 1976.

On consideration of the application and response, it appears that the issues involved are of sufficient complexity, and their resolution sufficiently uncertain, to warrant consideration by the full court. Such consideration ordinarily occurs at a regularly scheduled conference of the Court, to which the matter is referred by the Circuit Justice. The Court has a conference scheduled for Friday, December 10, but I have elected not to refer this application to that conference. Consideration by the full Court presupposes adequate time for each Justice to study the application and response prior to conference, and at this point such time simply is not available.

Since I do not believe that this case is of such extraordinary urgency as to warrant my requesting THE CHIEF JUSTICE to schedule a special conference to consider it, I have elected to refer the application to the next regularly scheduled conference of the Court. Because that conference will occur after December 15, the date on which the stay issued by the District Court expires, I think it is incumbent on me to exercise my authority as Circuit Justice to determine how the matter shall remain until it can be considered by the full Court. The state officials' showing of irreparable injury in the absence of a temporary stay, while not entirely unpersuasive, is not by any means overwhelming. Respondents' estimates of financial loss if the District Court stay is continued are at least equally marginal. Respondents have operated in compliance with the state statute for more than a year, and at no time during the pendency of their suit in the District Court did they seek preliminary relief. On balance I have decided that respondents should be required to continue to operate in this manner pending consideration of the application by the Court.

It is therefore ordered that the stay of the order of permanent injunction dated November 12, 1976, which would by its terms expire December 15, 1976, be continued until further order of this Court. The application for stay will be referred to the full Court at the conference following December 10.

No. A-456

DANIEL J. EVANS, GOVERNOR OF THE  
STATE OF WASHINGTON, ET AL.,

*Appellants,*

v  
ATLANTIC RICHFIELD COMPANY, ET AL.

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**ORDER**

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UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the stay of the order of the permanent injunction entered by the United States District Court for the Western District of Washington on November 12, 1976 in case No. C75-648 M, which would by its terms expire December 15, 1976, be continued until further order of this Court.

DATED this 9th day of December, 1976.

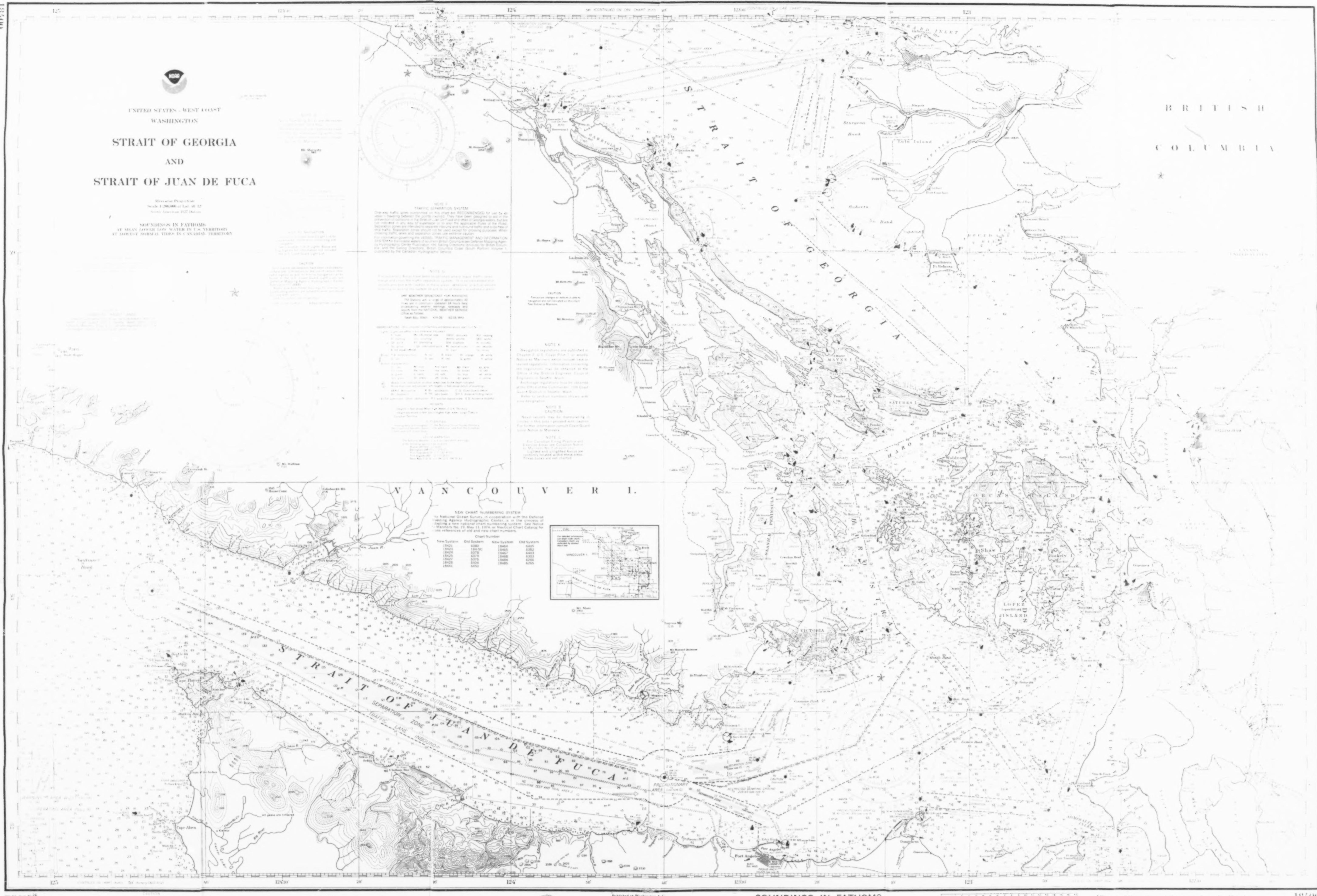
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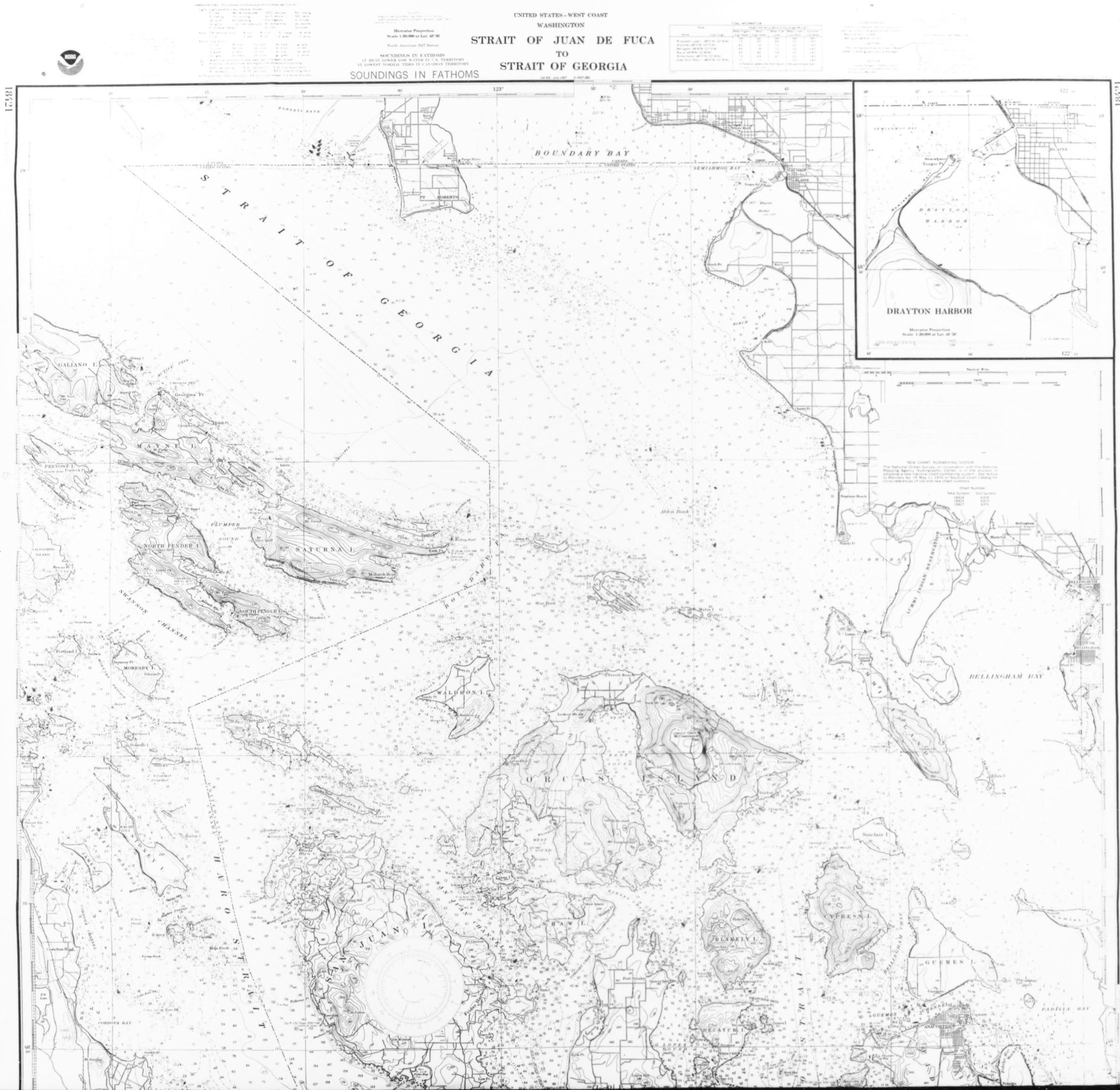
/s/ William H. Rehnquist  
Associate Justice of the  
Supreme Court of the  
United States

**MEMORANDUM DECISION****UNITED STATES SUPREME COURT**

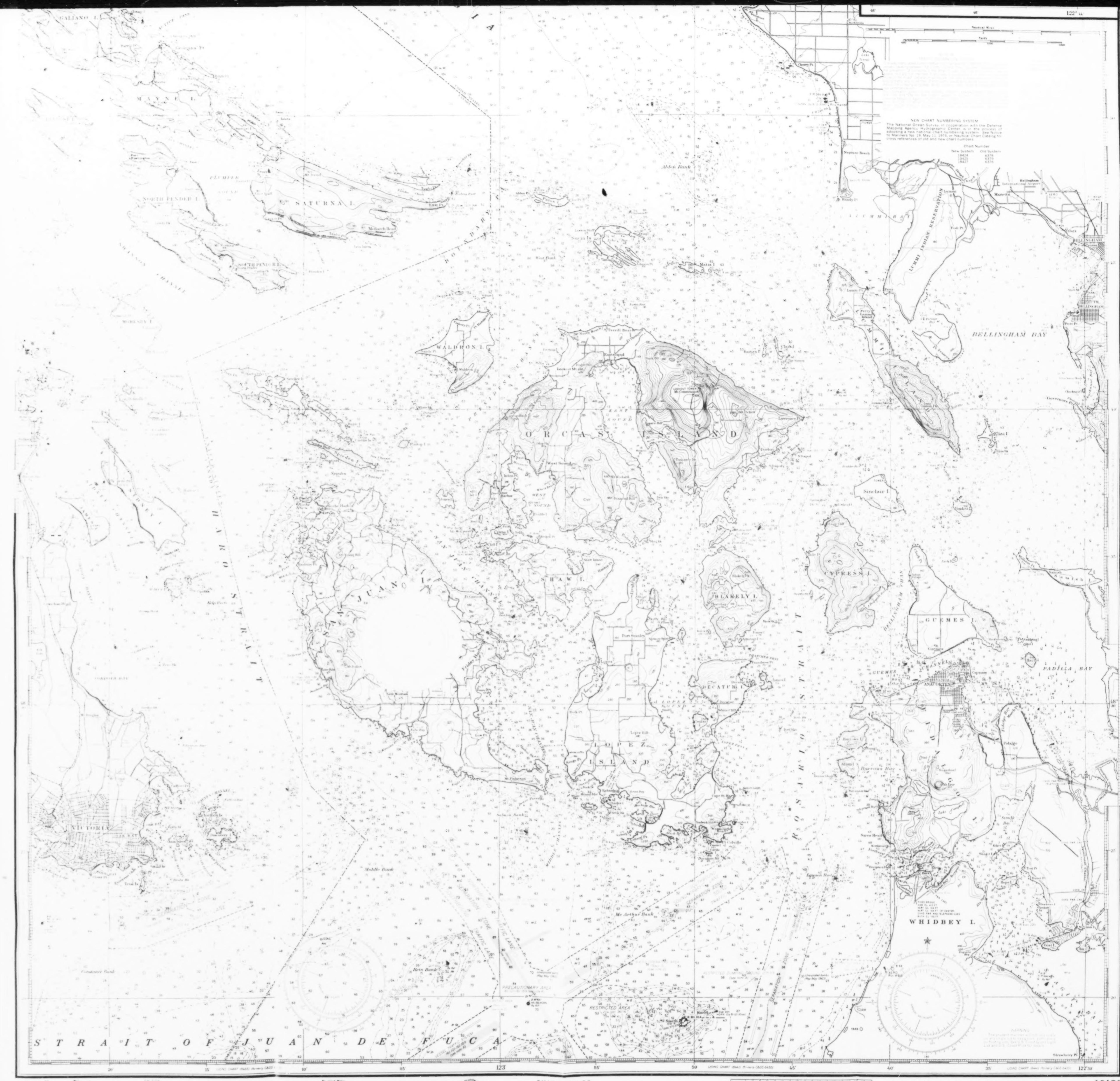
DANIEL J. EVANS, Governor of Washington  
et. al., appellants, v. ATLANTIC RICHFIELD  
COMPANY and SEATRAIN LINES,  
INCORPORATED. No. 76-930.

Jan. 10, 1977. Application for stay of order of the permanent injunction entered by the United States District for the Western District of Washington granted, pending final disposition of the appeal by this Court.



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Supreme Court, U. S.

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IN THE  
**Supreme Court of The United States**

OCTOBER TERM, 1976

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No. 76-930  
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DANIEL J. EVANS, Governor of the State of Washington,  
et al.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, et al.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

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**MOTION TO AFFIRM**  
\_\_\_\_\_

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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—  
**MOTION TO AFFIRM**  
—

Appellees Atlantic Richfield Company and Seatrail Lines, Inc., hereby move, pursuant to Supreme Court Rule 16, that the judgment of the United States District Court for the Western District of Washington be summarily affirmed on the ground that the decision below is manifestly correct and the questions sought to be presented by the appeal are so insubstantial as not to require further briefing or argument.

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**STATEMENT OF THE CASE**

1. **The Challenged State Statute**

At issue in this case is the constitutional validity of Washington's "Tanker Law," Chapter 125 of the 1975 Laws of the State of Washington (Revised Code of Washington §§ 88.16.170 *et seq.*), which is reproduced as

Appendix I to Appellant's Jurisdictional Statement. The Tanker Law regulates the size, design and navigation of oil tankers engaged in interstate and international trade -- an area long subject to exclusive regulation by the federal government -- for the stated purpose of protecting the State's waters from the risk of oil spills. R.C.W. § 88.16.170.

The Tanker Law has three operative provisions:

(1) Section 3(1) (the "Tanker Embargo"), R.C.W. § 88.16.190(1), absolutely prohibits any oil tanker over 125,000 deadweight tons ("DWT") from entering Puget Sound -- and thus from reaching any of the State's refineries or existing oil terminal facilities. (¶¶ 19, 107)<sup>1</sup>

(2) Section 3(2) (the "Design Requirements"), R.C.W. § 88.16.190(2), prohibits any oil tanker between 40,000 DWT and 125,000 DWT from entering Puget Sound unless it has all of the following design features: minimum shaft horsepower of at least one horsepower for each two and one-half DWT; twin screws; double bottoms underneath all oil and liquid cargo compartments; two radars, one of which must be collision-avoidance radar; and such other navigational systems as may be prescribed by the State Board of Pilotage Commissioners. A proviso to Section 3(2) (the "Tugboat Proviso") waives compliance with the Design Requirements if the tanker is at all times under the escort of tugboats with an aggregate horsepower of five percent of its deadweight tonnage.

(3) Section 2 (the "Pilotage Requirement"), R.C.W. § 88.16.180, provides that any oil tanker of 50,000 DWT or greater must employ a pilot licensed by the State of Washington while navigating Puget Sound.

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<sup>1</sup> Paragraph and Exhibit references are to the stipulation of facts incorporated into the Pre-Trial Order filed April 6, 1976, which constitutes the factual record in this case.

## 2. The Factual Background

The Tanker Law's regulation of the size, design and navigation of tankers permitted to enter Washington waters threatens to impose a scheme of piecemeal state regulation upon what the three-judge court below correctly described as "this most interstate, even international, of transportation systems." Jurisdictional Statement, Appendix C (hereinafter "Opinion"), at 8a. The United States now imports over 35 percent of its oil requirements. (¶ 47) More than 80 percent of this imported oil is brought into this country by tanker. (*Id.*) The vast majority of these vessels -- carrying 94 percent of U.S. tanker oil imports -- are registered in and fly the flags of foreign nations. (¶ 51)

Approximately two-thirds of the crude oil requirements of Atlantic Richfield's refinery at Cherry Point, Washington, on Puget Sound, are supplied by tanker deliveries from foreign sources. (¶ 16) All fifteen of the tankers over 125,000 DWT which prior to the Tanker Embargo called at Cherry Point were of foreign registry. (Ex. D) Of the 90 tankers between 40,000 and 125,000 DWT which have called at Cherry Point, over one-half were sailing under foreign registry. (Ex. C) The Tanker Law applies to all such tankers regardless of the national flag they fly. (¶ 12)

Tankers over 125,000 DWT are now in general use throughout the world because of the significant savings they provide (¶ 66) -- up to 50 percent on longer runs. (¶ 67) At the end of 1975 there were 727 tankers over 125,000 DWT in use, representing 59 percent of the world's total tanker capacity. (¶ 52) All but four of these vessels fly foreign flags. (¶ 55) The Tanker Embargo permanently excludes all of these vessels from Puget Sound, regardless of the amount of oil they actually carry on any given voyage. (¶ 10)

In addition to receiving tankers engaged in foreign trade, Puget Sound ports will soon play a significant role in the transportation of oil from the North Slope of Alaska to the lower 48 states. Oil is expected to begin to flow through the Trans-Alaska Pipeline this year (¶ 15), and will reach its capacity of 2,200,000 barrels of oil per day by 1981. (¶ 21) It is currently anticipated that all of this oil will be transported by tanker to ports on the West Coast, with approximately 15 percent destined for the Puget Sound area. (*Id.*) Atlantic Richfield's Cherry Point refinery was specifically designed and built to refine North Slope crude oil. (¶ 15)

Plans to transport this oil to the lower 48 states rely substantially on the use of tankers over 125,000 DWT. Docking facilities under construction at Valdez, Alaska, at the southern terminus of the Trans-Alaska Pipeline, are designed to accommodate fully loaded tankers of up to 250,000 DWT. (¶ 23) One-third of the tankers to be employed in the Alaska trade — and a larger percentage of the total tanker capacity — will be in excess of 125,000 DWT. (*Id.*)

Atlantic Richfield has under construction four new tankers over 125,000 DWT, at a cost of over \$200 million. (¶¶ 34, 35) Two of these tankers will be foreign flag and will be used to deliver foreign crude oil to Atlantic Richfield's United States refineries; the other two will be U.S. flag and are intended for use in transporting North Slope oil to West Coast ports, including — but for the Tanker Embargo — Puget Sound. (¶ 34)

### 3. Proceedings Below

Atlantic Richfield filed this lawsuit on September 8, 1975, the day the Tanker Law went into effect. Atlantic Richfield's complaint alleged that the Tanker Law was preempted by federal law, particularly the Ports and Waterways Safety Act of 1972 (PWSA); conflicted with

the PWSA and various other federal statutes; and unconstitutionally burdened interstate commerce and interfered with federal regulation of foreign affairs. Named as defendants were Washington Governor Daniel J. Evans and other state officials responsible for enforcement of the Tanker Law.<sup>2</sup> Because substantial issues under the commerce clause and foreign affairs provisions of the Constitution were raised by the complaint, a three-judge court was convened.

After the parties reached agreement on a detailed stipulation of facts, embodied in a Pre-Trial Order filed April 6, 1976, and filed exhaustive briefs, the three-judge court heard four hours of argument on June 25, 1976. The court also had before it briefs filed by several *amici curiae*, including briefs filed by the United States in support of its contention that "Congress by the passage of the Ports and Waterways Safety Act plainly intended to pre-empt the field of oil tanker regulation." Brief of the United States at 7.

The three-judge court issued its opinion and order holding the Tanker Law invalid on September 24, 1976. In a six-page per curiam opinion, the court held that Sections 3(1) and 3(2) of the Tanker Law — the Tanker Embargo, Design Requirements and Tugboat Proviso — were preempted by the PWSA. The court held that PWSA established a comprehensive federal scheme for regulating the navigation and safety design specifications of tankers. Opinion at 7a. The court found that the purpose of the PWSA was "to establish a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions

<sup>2</sup> Seatrain Lines, Inc., a shipping and shipbuilding firm which constructs and operates tankers over 125,000 DWT, subsequently intervened as a plaintiff, and joins with Atlantic Richfield in making this Motion to Affirm. Four environmental organizations and the King County (Seattle) Prosecuting Attorney intervened as defendants.

under which they would be permitted to operate." *Id.* at 8a. The court also found that "[b]alkanization of regulatory authority over this most interstate, even international, of transportation systems"—as would result if state regulation like Washington's Tanker Law were permitted—"is foreclosed by the national policy embodied in the PWSA." *Id.*<sup>3</sup>

The three-judge court further held that Section 2 of the Tanker Law, the Pilotage Requirement, was invalid as applied to tankers engaged in the "coastwise" (domestic) trade because "it conflicts with clear federal law," citing 46 U.S.C. §§ 215, 364. Opinion at 9a.<sup>4</sup>

The court, relying on *Ex parte Young*, 209 U.S. 123 (1908), also denied the motion of the defendant state officials to dismiss the complaint on Eleventh Amendment grounds. Opinion at 6a.

The three-judge court initially declined to enter injunctive relief, believing an injunction "unnecessary" on the presumption that the defendant state officials would respect its declaratory judgment. *Id.* at 12a. As soon as it became apparent that the defendants intended to continue enforcement of the statute notwithstanding the court's ruling, Atlantic Richfield moved for supplementary injunctive relief. After a hearing on November 12,

<sup>3</sup> The three-judge court found it unnecessary to address the other issues raised by Atlantic Richfield in its challenge to Sections 3(1) and 3(2) of the Tanker Law. Opinion at 12a.

<sup>4</sup> Appellants apparently concede the constitutional invalidity of the Pilotage Requirement, for they do not raise this issue as a question presented or discuss it in their Jurisdictional Statement. In any event, there can be no reasonable dispute that the Pilotage Requirement conflicts with these federal statutes. *Sprague v. Thompson*, 118 U.S. 90, 95-96 (1886); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1912); *Davis v. M/V Ester S.*, 509 F.2d 1377, 1380-81 (5th Cir. 1975). Indeed, appellants agreed in the Pre-Trial Order that "46 U.S.C. § 215 . . . provides that a state . . . may not require such [state licensed] pilots on enrolled vessels" (i.e., those engaged in coastwise trade). (¶ 142)

1976, the three-judge court issued its Order of Permanent Injunction enjoining enforcement of the Tanker Law. Jurisdictional Statement, Appendix B. The injunction was stayed by this Court on January 10, 1977, pending final disposition of this appeal.

## QUESTIONS PRESENTED

1. Was the three-judge court correct in holding that Sections 3(1) and 3(2) of Washington's Tanker Law are invalid under the Supremacy Clause because they seek to regulate an area preempted by the federal government under the Ports and Waterways Safety Act?
2. Should *Ex parte Young*, 209 U.S. 123 (1908), be overruled?<sup>5</sup>

## ARGUMENT

### I. THE THREE-JUDGE COURT'S RULING THAT THE TANKER LAW HAS BEEN PREEMPTED BY THE PORTS AND WATERWAYS SAFETY ACT IS MANIFESTLY CORRECT AND SHOULD BE SUMMARILY AFFIRMED

The holding of the court below that the Tanker Law's Tanker Embargo, Design Requirements and Tugboat Proviso have been preempted by the Ports and Waterways Safety Act is manifestly correct and should be

<sup>5</sup> If this Court should note probable jurisdiction, Atlantic Richfield will also brief and argue, as alternative grounds for affirming the judgment of the court below, that the Tanker Law is invalid even if the PWSA is not given preemptive effect because it conflicts with the PWSA, Coast Guard regulations thereunder, and the certification and permit provisions of the Tank Vessel Act as amended by the PWSA; that the Tanker Embargo is invalid because it conflicts with rights granted by the federal vessel registration, enrollment and licensing laws as interpreted in *Gibbons v. Ogden*, 22 U.S. 1 (1824); that the Tanker Embargo also conflicts with the Merchant Marine Act of 1970 and the Maritime Administration's Tanker Construction Program thereunder; and that the Tanker Law unduly burdens interstate

summarily affirmed by this Court without further briefing or argument. *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

Appellants create the misleading impression that the decision of the court below was based on nothing more than the comprehensiveness of the regulatory scheme established by the PWSA, and studiously avoid any discussion of the terms of the federal statute or its legislative history. But, as the discussion to follow demonstrates—and as the per curiam opinion of the three-judge court reflects—examination of the PWSA and its legislative history can leave no reasonable doubt that Congress intended to occupy the field and preempt state regulation of oil tanker size, design and navigation for the purpose of environmental protection.

**A. The PWSA and Its Legislative History Clearly Establish Congressional Intent to Preempt State Regulation**

The Ports and Waterways Safety Act was enacted in 1972, Pub. L. No. 92-340, 86 Stat. 424, in order to establish a comprehensive scheme of federal regulation of oil tanker design, construction and operation for the purpose of protecting the marine environment against the danger of oil spills. *See S. Rep. No. 92-724*, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Cong. & Ad. News 2766 (hereinafter the "Senate Report"), at 2766-69. The PWSA and Coast Guard regulations promulgated thereunder deal explicitly with regulation of tanker size, design, and movement, the precise areas of regulation attempted by

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and foreign commerce, impermissibly interferes in a field where uniform federal regulation is essential, and interferes with federal power to regulate foreign commerce, make treaties and conduct foreign affairs. Each of these issues was briefed and argued to, but not decided by, the court below.

Washington in its Tanker Law. Indeed, each feature of the Tanker Law has been expressly considered—and, for the most part, rejected—by the Coast Guard in the exercise of its regulatory authority under the PWSA.

In Title I of the PWSA, now codified at 33 U.S.C. §§ 1221 *et seq.*, Congress authorized the Coast Guard to establish vessel traffic systems and controls for environmental protection, including, *inter alia*, the authority to establish tanker size or speed limitations, or to restrict tanker operations to vessels having particular characteristics deemed necessary for safety. PWSA § 101(3), 33 U.S.C. § 1221(3). Title II of the PWSA amended the Tank Vessel Act, 46 U.S.C. § 391a, to authorize the Coast Guard to adopt uniform federal regulations for the design, construction, maintenance and operation of tankers for environmental protection. PWSA § 201(3), 46 U.S.C. § 391a(3); *see* Senate Report at 2767. Congress specifically required the Coast Guard to adopt design and construction standards to improve tanker maneuvering and stopping ability and to limit cargo loss in the event of an accident. PWSA 201(7), 46 U.S.C. § 391a(7).

The Coast Guard has acted to carry out this congressional mandate. Coast Guard regulations to implement Title I have established a vessel traffic control system for Puget Sound. 39 Fed. Reg. 25430 (July 10, 1974), 33 C.F.R. Part 161 Subpart B. This system establishes a network of separated traffic lanes in Puget Sound, each 1,000 yards wide and separated by zones 500 yards wide, and requires vessel communications contact with the Coast Guard's Vessel Traffic Center in Seattle. (\* 70, Exs. G, U) In the Rosario Strait area of Puget Sound, where such separated traffic lanes are not feasible, the Coast Guard prohibits the passage of more than one tanker over 70,000 DWT in either direction at any given time, a size limitation which is reduced to 40,000 DWT in adverse weather. (\* 70) The Coast Guard has also

delegated to its local District Commander and Captain of the Port its authority under PWSA § 101(3), including the authority to exclude tankers over a given size if they determine such action is appropriate. 40 Fed. Reg. 6653 (Feb. 13, 1975), 33 C.F.R. Part 160.

Coast Guard regulations to implement Title II require all new tankers over 70,000 DWT to have such features as segregated ballast tanks which must carry only sea water and be so located as to provide protection against oil spillage in the event of accidental penetration of the hull. The regulations also impose limitations on cargo tank arrangement and size, and establish structural and damage stability requirements intended to reduce oil loss in the event of accident. 40 Fed. Reg. 48280 (Oct. 14, 1975), 41 Fed. Reg. 1479 (Jan. 8, 1976), and 41 Fed. Reg. 54177 (Dec. 13, 1976), 33 C.F.R. Parts 151, 157.

During the course of its development and promulgation of these regulations, the Coast Guard considered and expressly rejected requirements for double bottoms, twin screws, and extraordinary horsepower—all requirements of the Tanker Law—for a variety of reasons, including the need for uniform international design standards and doubts as to the efficacy of these features. See United States Coast Guard, Final Environmental Impact Statement, Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade (Aug. 15, 1975) (Ex. X) (hereinafter “Coast Guard EIS”), at 4-10, 60-76. Possible Coast Guard adoption of tug escort requirements continues under active consideration. Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976); see also Coast Guard EIS at 71.

Federal regulation under the PWSA is comprehensive, as the court below observed. But appellees have never contended—and the court below did not hold—that the comprehensiveness of the federal scheme in itself re-

quired the holding that the PWSA had preempted the field. The court below also had before it overwhelming evidence of explicit congressional intent to preempt state regulation of vessel size, design and movement, contained in both the statute itself and its legislative history.

Section 102(b) of the PWSA, 33 U.S.C. § 1222(b), was expressly intended to make “absolutely clear” congressional intent to preempt state regulation of vessels. H.R. Rep. No. 92-563, 92d Cong., 1st Sess. (1971) (hereinafter “House Report”), at 15. Section 102(b) provides that Title I does not “prevent a State or political subdivision thereof from prescribing *for structures only* higher safety equipment requirements or safety standards.” (Emphasis added) This language was added to the statute in committee in response to testimony urging that the bill be amended to make explicit congressional intent to occupy the field of vessel regulation. See, e.g., *Hearings on Port and Harbor Safety before the Subcommittee on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. (1971) (hereinafter “House Hearings”), at 141, 170-72, 186. In particular, the Chairman of the National Transportation Safety Board urged adoption of uniform federal regulation of vessels because to fail to do so “could result in a patchwork quilt approach which would lack standard frequencies and equipment and would place a greater burden upon ships than a federally-regulated program. . . . [A] federally-controlled program would minimize the variety of requirements both foreign and domestic shipping would have to meet.” House Hearings at 348-49. See also *id.* at 377 (Statement of Appellant Sierra Club urging “[n]ational, uniform Federal action”).

During committee hearings, several congressmen specifically mentioned the need to preempt state regulation of vessels so as to prevent a state from imposing an

absolute limitation on the size of tankers permitted to operate in its waters, as Washington has attempted to do here. For example, Congressman Keith declared that state laws “banning giant tankers” should not be permitted, saying that “[w]e do not want the States to resort to individual actions that adversely affect our national interest.” *Id.* at 30. Congressman Tiernan agreed, adding that such a size limit would require “more vessels in carrying the fuels we need for our demands in keeping the economy going.” *Id.* at 32. See also *id.* at 172; *Hearings on the Navigable Waters Safety and Environmental Quality Act Before the Senate Committee on Commerce*, 92d Cong., 1st Sess. 81 (1971) (Statement of Senator Inouye); Senate Report at 2792.

The House Committee Report explains that it was amending Section 102(b) to make explicit congressional intent to preempt state regulation of vessels:

“This amendment was suggested since it was felt that H. R. 8140 [the bill which became the PWSA] does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. *The inserted language is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated.*” House Report at 15 (emphasis added).

Indeed, the committee report notes that “one of the strong points of the legislation is the imposition of federal control in the areas envisioned by the bill which will insure regulatory and enforcement uniformity . . . .” *Id.* at 8.

Similarly, as the court below held, Opinion at 8a, the purpose of Title II of the PWSA was to establish uniform federal regulations governing the design, construction and operation of tankers. The necessity for uniform federal regulation of maritime affairs has been recog-

nized since the nation’s founding. *See generally* Constitution Art. III, § 2, cl. 1; *The Lottawanna*, 88 U.S. 558, 575 (1875); *Gibbons v. Ogden*, 22 U.S. 1, 190 (1824). The need for national uniformity is nowhere more compelling than with regard to the design, construction and operation of the vessels of interstate and foreign trade themselves. *See Kelly v. Washington*, 302 U.S. 1, 14-15 (1937). In response to this need, Congress, starting with the first vessel inspection laws, 5 Stat. 304 (1838), and continuing to the present, has established a comprehensive scheme of federal regulation of vessel design, construction and operation. *See* 46 U.S.C. §§ 361 *et seq.*; Title 46, C.F.R.

In 1936, Congress made oil tankers subject to this comprehensive regulatory scheme with passage of the Tank Vessel Act, 49 Stat. 1889, 46 U.S.C. § 391a. Section 2 of the 1936 Act granted the Coast Guard authority to promulgate regulations establishing standards of tanker design, construction, equipment and operation, in terms almost identical to those of Section 201(3) of the PWSA, principally for the purpose of protecting “life and property.” *See* Senate Report at 2781.

The purpose of the original Tank Vessel Act was to establish “a reasonable and uniform set of rules and regulations concerning ship construction, equipping, operation and manning . . . .” H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936). Title II of the PWSA merely amended the Tank Vessel Act and expanded this comprehensive regulatory scheme to add express Coast Guard authority to adopt such uniform regulations for the purpose of environmental protection as well as for vessel safety. *See* Senate Report at 2786.<sup>6</sup>

<sup>6</sup> Significantly, when concern subsequently arose over the safety of the tankers to be employed in carrying North Slope oil to West Coast ports, Congress responded by advancing to June 30, 1974, the deadline, contained in Section 7(C) of Title II, 46 U.S.C. § 391a(7)(C), for the adoption by the Coast Guard

Congressional intent to continue uniform national regulation of tanker design and movement is also demonstrated by the recognition in the PWSA and its legislative history of the desirability of uniform international standards. During its consideration of the PWSA, Congress was well aware that unilateral tanker regulation by the United States raised difficult and diplomatically sensitive foreign relations questions which had to be addressed with care in the federal statute. The Departments of State and Transportation expressed concern that unilateral imposition of design and construction standards by the United States on foreign flag vessels might violate our obligations under the International Convention for the Safety of Life at Sea ("SOLAS"), 16 U.S.T. 185, T.I.A.S. 5780, 536 U.N.T.S. 27 (1960) (Ex. HH), and undermine the United States' active efforts to achieve international agreement on uniform standards of tanker design, equipment and operation at the then-impending 1973 Marine Pollution Conference held under the auspices of the Inter-Governmental Maritime Consultative Organization ("IMCO"), the maritime arm of the United Nations. See Senate Report at 2804, 2807-10. The Senate Commerce Committee also received a communication from twelve foreign governments protesting the prospect of unilateral tanker regulation by the United States. *Id.* at 2800-01.

Congress fully recognized the validity of these concerns. *See id.* at 2782. The report of the Senate Commerce Committee stated:

"[T]he committee recognized that this has traditionally been an area for international rather than national action. Moreover, international solutions in

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of regulations for tankers in domestic trade, Trans-Alaska Pipeline Authorization Act § 401, Pub. L. No. 93-153, 87 Stat. 589 (1973), rather than authorizing state regulation of tanker size, design or operation. See 119 CONG. REC. 22836-39 (1973).

this area are preferable since the problem of marine pollution is world-wide. . . .

"The committee fully concurs that multilateral action with respect to comprehensive standards for the design, construction, maintenance and operation of tankers for the protection of the marine environment would be far preferable to unilateral imposition of standards." *Id.* at 2783.

Accordingly, Title II was amended in two significant respects. First, in Section 7(C), 46 U.S.C. § 391a(7)(C), Congress postponed the earliest effective date of regulations under Title II until January 1, 1974, after the IMCO Conference, and authorized the Coast Guard further to delay implementation of these regulations until January 1, 1976, in order to allow additional time for development of international standards. *See H.R. Rep. No. 92-1178, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Cong. & Ad. News 2811 (hereinafter "House Conference Report"), at 2812-13.<sup>7</sup> Second, Section 7(C) authorized the Coast Guard to defer to internationally adopted standards "which generally address the regulation of similar topics for the protection of the marine environment," even though such standards might not be identical to those initially proposed by the Coast Guard. Senate Report at 2788; House Conference Report at 2813.<sup>8</sup>*

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<sup>7</sup> Congress subsequently advanced to June 30, 1974, the deadline for promulgation of regulations with respect to tankers in domestic trade. *See note 6 supra.* This amendment did not affect the Coast Guard's discretion to postpone implementation of regulations for tankers in foreign trade in order to allow additional time for development of uniform international standards.

<sup>8</sup> The regulations adopted by the Coast Guard under the PWSA in fact defer substantially to the standards of the International Convention for the Prevention of Pollution from Ships (Ex. PP), adopted by the 1973 IMCO Conference and currently awaiting ratification by member nations. The Coast Guard explains that unilateral United States action would jeopardize

Congress thus recognized the desirability of uniform international standards and the international sensitivity of unilateral American tanker regulation; indeed, it amended Title II to provide the Coast Guard with "more flexibility with respect to the unilateral imposition of standards on foreign vessels," in order to minimize these international problems. House Conference Report at 2813. In light of this, it is inconceivable that Congress could have intended to allow independent action by the individual states, having neither the same sensitivity to the international implications of unilateral tanker regulation nor the capacity to deal with any adverse international repercussions. *See generally United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Pink*, 315 U.S. 203, 232-33 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Appellants are unable to rebut this compelling evidence of congressional intent to preempt state regulation. They rely principally on the personal opinion of Senator Magnuson of Washington that the decision of the court below was wrong. But, as the Court recently held, "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

Appellants also point out that Title II refers to "comprehensive minimum standards" of tanker design and construction. Use of the word "minimum" merely signifies congressional intent to leave the nuts and bolts of ship construction where they have always been, with the ship owner or shipbuilder, subject to compliance with Coast Guard regulations. In this sense, all of the Coast Guard's detailed regulations on vessel construction for

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ratification of the Convention by other nations and risk other adverse international repercussions. Coast Guard EIS at 4-8, 219.

purposes of vessel safety under the federal inspection laws and the original Tank Vessel Act are likewise "minimum standards." Congress has repeatedly used the term "minimum standards" in just this sense in other laws where, as here, preemption was intended. *See, e.g.*, Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671 *et seq.*; *Tenneco, Inc. v. Public Service Comm'n*, 489 F.2d 334 (4th Cir. 1973), *cert. denied*, 417 U.S. 946 (1974); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 *et seq.* Indeed, the court below used the term "minimum design specifications" in this sense in describing the Tanker Law. Opinion at 8a.

Appellants also suggest that Section 3(2) of the Tanker Law is not preempted by the PWSA because its Design Requirements can be avoided — at a price — if a tanker employs a tugboat escort. But the Court below correctly concluded that the Tugboat Proviso of Section 3(2) has likewise been preempted by the PWSA. Opinion at 8a. The Tanker Law's combination of Design Requirements and Tugboat Proviso substantially interferes with the PWSA's objective of uniform federal regulation of tanker design. The effect of this provision is to pressure tanker owners to incorporate the state's preferred design features in their vessels and to impose an economic penalty for failing to do so. The PWSA gives the Coast Guard ample authority to adopt such a regulatory approach, PWSA §§ 101(3)(iii), (iv), and in fact the Coast Guard has tug escort requirements under active consideration, Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976), which "are intended to provide uniform guidance for the maritime industry and Captains of the Port for the use of tugs . . ." *Id.* at 18771. The Coast Guard has suggested that tugboat escorts will be required for vessels not incorporating certain design features in addition to those expressly required by its regulations, thereby offering the prospec-

tive ship owner “incentives to incorporate those individual added design features which he feels are to his economic advantage, while at the same time allowing him flexibility in evaluating the economic trade-off of vessel design.” Coast Guard EIS at 71.

Finally, appellants claim that even the Coast Guard does not regard the PWSA as precluding state regulation, quoting a Coast Guard statement that its regulations “are not a complete and comprehensive answer.” Taken in context, however, all the Coast Guard was saying there was that its regulatory supervision of the design and movement of tankers would be continuous and evolving. See Coast Guard EIS at 1, 81-82. In fact, the Coast Guard has consistently taken the position that the PWSA and its regulatory authority thereunder were intended to preempt the field. See Brief of the United States as Amicus Curiae; Opinion of the Coast Guard General Counsel, dated July 10, 1975 (appended to Atlantic Richfield’s Trial Brief). This construction of the PWSA by the agency charged with its enforcement is entitled to “great weight”. *Investment Company Institute v. Camp*, 401 U.S. 617, 626-27 (1971); see also *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1152 (8th Cir. 1971), aff’d mem., 405 U.S. 1035 (1972).

#### B. The Permissibility of State Regulation of Port Facilities and Pollution Liability Does Not Support State Regulation of Vessel Design and Operation

Appellants argue that the Tanker Law regulates in an area of “traditional state competence,” relying on several cases which uphold state power to regulate various local aspects of port and harbor safety against commerce clause challenges, and point to several federal statutes other than the PWSA which allow the states a role in port regulation and pollution liability. But neither these cases nor these statutes involve state reg-

ulation of the design, construction or operation of the vessels of interstate and foreign trade themselves in the face of a federal statute occupying the field.<sup>9</sup> As shown above, regulation of tanker design, construction and operation has long been subject to extensive federal control under the vessel inspection laws, the Tank Vessel Act, and now the PWSA. The very fact that the statutes on which appellants rely explicitly invite state participation in various other aspects of pollution control highlights the fact that Congress in enacting the PWSA did not intend to share regulatory authority over tanker design and movement with the states. See Opinion at 9a.

Appellants first rely on the Federal Water Pollution Control Act, and this Court’s holding in *Askew v. American Waterways Operators*, 411 U.S. 325 (1973), that the FWPCA did not preempt state laws imposing strict liability for oil pollution damage. But, as the three-judge court recognized, the Florida statute at issue in *Askew* dealt with oil spill liability rules, and, unlike Washington’s Tanker Law, “did not attempt to regulate the design of the tanker or tanker operations.” Opinion at 10a. Moreover, the FWPCA—in contrast to the PWSA—expressly disclaims any intent to preempt the states “from imposing any requirement or liability with respect to the discharge of oil.” 33 U.S.C. § 1321(o)(2).

Appellants also contend that the Deepwater Port Act of 1974 gives the states an absolute veto over whether

<sup>9</sup> This Court’s decision in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), is plainly distinguishable from the instant case. The Court in *Huron* upheld a Detroit smoke abatement ordinance as applied to vessels on the ground that the preemptive scope of the federal vessel inspection laws was at that time limited to vessel safety and did not encompass air pollution control. As the three-judge court pointed out, passage of the PWSA specifically expanded the purposes and preemptive scope of federal law to include protection of the marine environment against oil spills from tankers. Opinion at 10a.

supertankers may use such deepwater ports located more than three miles off their shores. Appellants' contention simply misreads the statute. The Deepwater Port Act does not give any state the power to regulate the size, design or movement of the vessels using such a deepwater port facility. On the contrary, 33 U.S.C. § 1509 expressly requires the Secretary of Transportation to prescribe regulations governing vessel movement, equipment and operation for the purpose of navigational safety and environmental protection. The Deepwater Port Act does give adjacent states a veto power over construction of such a deepwater port, but this veto power is based on an extension of the states' existing power to regulate port facilities on land<sup>10</sup> and was adopted by Congress primarily to afford coastal states an opportunity to protect themselves from the impact of land-based industrial development which a deepwater port would generate. S. Rep. No. 93-1217, 93d Cong., 2d Sess. (1974), 1974 U.S. Code Cong. & Ad. News at 7537-39.

Finally, appellants contend that the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.* (CZMA), and the approval of the Washington Coastal Zone Management Program by the National Oceanic and Atmospheric Administration (NOAA) on June 1, 1976, somehow bear on the issue of whether the Tanker Law is preempted by the PWSA. But there is nothing in the CZMA which would allow the states—or authorize NOAA to allow the states—to interfere with the Coast Guard's exclusive regulation of vessel design and movement under the PWSA. As appellants are forced to admit, such a result is expressly barred by Section 307(e) of the CZMA, 16 U.S.C. § 1456(e).

Equally important, the basic premise of appellants' argument—that the Tanker Law is an integral part of

<sup>10</sup>A deepwater port is defined in the Act as "any fixed or floating manmade structures other than a vessel . . ." 33 U.S.C. § 1502(10). Compare PWSA § 102(b).

the State's Coastal Zone Management Program approved by NOAA—is not supported by the facts. As the reply brief filed by the United States in the court below points out at page 3, appellants' contention "is utterly without foundation, for the Coastal Zone Management Act and the State of Washington's plan thereunder have nothing to do with the field of tank vessel regulation." The Tanker Law is mentioned only once in passing in the 300-page Program document, at page 18, and that one brief reference noted that the Law was being challenged as unconstitutional. The affidavit of the Assistant Administrator of NOAA, submitted by the United States together with its reply brief, expressly disclaims any intention to approve Washington's Tanker Law as part of the State's Coastal Zone Management Program. (Ex. BBB)

Nor is the Tanker Law an integral part of the State's proposal for a single oil terminal facility to be located at Port Angeles. The Tanker Law was enacted by the State Legislature nearly two years ago and makes no mention of the single terminal concept. No single terminal legislation has been passed by the State, and the single terminal remains a distant dream. Despite the State's attempt to include the single terminal proposal in its Program by a last-minute amendment while this case was before the district court, the Program acknowledged even then that the "possibility" of development of such a terminal was only a "proposal" which should be studied further to make a "feasibility determination." Amendments to Washington State Coastal Zone Management Program, March 29, 1976 (Ex. AAA), at 11.

#### C. Tanker Regulation Must Remain Exclusively in the Federal Forum

Over the past two months public attention has focused on the question of tanker safety in the wake of several

tanker incidents. In light of this, it is important to reiterate that the issue presented in this case is not whether there should be more stringent regulation of tanker safety, or what the content of such regulations should be. As the United States stated in its brief to the court below, at 9-10:

“In the final analysis, the question is not whether the design and operation of oil tankers should be regulated and controlled in the interests of the marine environment, for it is common ground that such regulation is required. The question in this case is whether that control is to be exercised and the scope of the regulations determined by the federal government in the manner which Congress has prescribed, or whether those determinations are to be made by the inconsistent and diverse action of the several states.”

The risk of such “inconsistent and diverse actions” is real. Already, the State of Alaska has enacted legislation which requires payment of substantial “risk charges” as well as use of tug escorts by tankers unless the tanker meets design requirements entirely different from those required by the Washington Tanker Law. Alaska Statutes §§ 30.20.010 *et seq.* California and other states are waiting in the wings, as their amicus briefs filed in the court below and in this Court attest. *See also* ¶ 153. The problem obviously created by the probability of proliferating state regulation of the size, design and navigation of tankers emphasizes the need for national uniformity in the regulations imposed upon vessels engaged in interstate and foreign commerce. *See City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 627-28, 639 (1973); *Kelly v. Washington*, 302 U.S. 1, 14-15 (1937); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945).

Congress in enacting the PWSA recognized this need for uniform federal legislation and acted to preempt

such diverse and potentially conflicting state laws. If the appellants are dissatisfied with the Coast Guard's regulatory efforts, their remedy is to seek additional action at the federal level. Pursuing this course, the appellant environmental groups have filed suit against the Coast Guard charging that its regulations do not comply with its statutory mandate under the PWSA. *Natural Resources Defense Council v. Coleman*, Civil Action No. 76-0181 (D.D.C., filed Feb. 2, 1976). Similarly, legislation has already been introduced in the new Congress to amend the PWSA to require adoption of more stringent regulations, H.R. 711, 95th Cong., 1st Sess. (Jan. 4, 1977); S. 182, 95th Cong., 1st Sess. (Jan. 11, 1977); *see* 123 CONG. REC. S409 (daily ed. Jan. 11, 1977), and hearings on this subject were held by the Senate Commerce Committee on January 11 and 12. The Constitution, the PWSA, and common sense require that tanker regulation remain exclusively in this national forum.

## **II. THE ELEVENTH AMENDMENT DOES NOT BAR A SUIT AGAINST STATE OFFICIALS SEEKING TO ENJOIN THEIR ENFORCEMENT OF AN UNCONSTITUTIONAL STATE LAW**

The other issue raised by appellants in their Jurisdictional Statement is whether a suit against state officials to restrain their enforcement of a state statute invalid under the federal Constitution is a suit against the State for purposes of the Eleventh Amendment. Appellants seek to put in issue the continued viability of *Ex parte Young*, 209 U.S. 123 (1908), where the Court held that such a suit is not barred by the Eleventh Amendment. The Court held that such a suit does not present any challenge to the legitimate sovereignty of the State, and that a state official attempting to enforce an unconstitutional statute can obtain from such an invalid

statute no immunity from responsibility to the superior authority of the federal constitution. *Id.* at 159-60.

Appellants suggest no reason why *Ex parte Young* should now be overruled. This Court has never doubted its continuing viability. As the Court unanimously held in *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974), "since *Ex parte Young* . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." *See also Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952).

Appellants contend that appellees may have been entitled to bring an action in the state courts for declaratory relief — though apparently not for the injunctive relief Atlantic Richfield also sought, and obtained, in federal court. Even if this were true, it is irrelevant to the Eleventh Amendment issue, which goes to the question of the federal courts' judicial power. As this Court recently held in *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972), "the availability of declaratory relief in [the state] courts on appellants' federal claims is wholly beside the point." *See also Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

Moreover, this Court has indicated that in determining whether a suit is brought against a state for purposes of applying the Eleventh Amendment, it is appropriate to look to the law of the state in question. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 463 (1945). Under Washington law "when the constitutionality of a statute is challenged the action is not one against the state; rather, it is one against the named defendant individually . . ." *Hanson v. Hutt*, 83 Wash. 2d 195, 202, 517 P.2d 599, 604 (1974). It is singularly inappropriate for defendants to suggest that the Eleventh Amendment affords them immunity from suit in this Court when the Wash-

ington Supreme Court does not consider such a suit to be a suit against the State.

### III. CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be summarily affirmed.

Respectfully submitted,

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February 4, 1977

IN THE  
**SUPREME COURT**  
OF THE  
UNITED STATES  
OCTOBER TERM  
No. 76-930

Court, U. S.

FILED

FEB 17 1977

MICHAEL RODAK, JR., CLERK

DIXY LEE RAY, Governor of the State of Washington;  
SLADE GORTON, Attorney General of the State of Washington; JOHN C. HEWITT, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; DAVID S. McEACHRAN, Whatcom County Prosecuting Attorney; CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney; COALITION AGAINST OIL POLLUTION; NATIONAL WILDLIFE FEDERATION; SIERRA CLUB; and ENVIRONMENTAL DEFENSE FUND, INC.,

Appellants,

v.

ATLANTIC RICHFIELD COMPANY, and SEATRAIN LINES, INC.,  
Appellees.

**BRIEF OF APPELLANTS IN OPPOSITION TO  
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October Term, 1976  
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*Appellees.*

**On Appeal From The United States District Court  
For The Western District Of Washington**

**BRIEF OF APPELLANTS IN OPPOSITION  
TO MOTION TO AFFIRM**

Appellants, Dixy Lee Ray, Governor of the State of Washington, *et al.*,<sup>1</sup> pursuant to Rule 16(4), submit this brief in opposition to Appellees' motion to affirm primarily in order to dispel the misleading impression that (1) the legislative history of the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424 (the "PWSA") reflects an unambiguous intent to preempt state law; and (2)

<sup>1</sup>On January 12, 1977, Dixy Lee Ray succeeded Daniel J. Evans as Governor of the State of Washington and John C. Hewitt became the Chairman of the Board of Pilotage Commissioners. Pursuant to Rule 48(3) of the Rules of the Supreme Court, they are therefore substituted as Appellants for former Governor Evans and for William C. Jacobs, respectively.

Chapter 125 of the Laws of the State of Washington, 1975, First Extraordinary Session, codified at R.C.W. §§ 88.16.170 *et seq.* ("Chapter 125") is inconsistent with the objective of the PWSA to encourage the development of adequate international standards regulating tanker-generated oil pollution.

### **I. The Legislative History of the PWSA Does Not Demonstrate An Unambiguous Intent to Preempt State Law**

Neither the history of Title I nor the history of Title II of the PWSA demonstrates an unambiguous intent to preempt all state regulation of tanker pollution hazards.<sup>2</sup> It is thus not surprising that the District Court relied on no such history in reaching its decision.

In order to understand the intent of the framers of Title I, this legislation must be put in historical context. Prior to 1972, the Coast Guard's authority to regulate port safety was fragmented. It acted under three separate grants of authority: the Tank Vessel Act of 1936, 49 Stat. 1889; the Magnuson Act, 50 U.S.C. § 191; and 46 U.S.C. § 170. Significantly, the first two statutes were wholly silent as to preemption, while the third contained a specific

<sup>2</sup>A finding of preemption must be based on a clear and unmistakable expression by Congress of the intention to preempt state regulation. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963); and *Reid v. Colorado*, 187 U.S. 137, 148 (1902).

waiver of preemption.<sup>3</sup> It thus can scarcely be said that, prior to 1972, regulation of the movement of hazardous cargoes in our ports and waterways was recognized by Congress as an exclusively federal function.

The purpose of Title I was simply to place Coast Guard regulation on a more permanent and broader statutory footing, confirming existing authority and extending it to allow for the establishment of vessel traffic control systems made possible by newly developed technology. See generally H.R. Rep. No. 92-563, 92d Cong., 1st Sess. 3 (1971). While the legislative history of Title I of the PWSA reflects some concern about the regulation of vessels by state and local authorities, this concern was directed primarily at situations where *conflict* might arise between state and federal legislation, see, e.g., Statement of James Reynolds, President, American Institute of Merchant Shipping, in *Hearings Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries on H.R. 17830, H.R. 18047, H.R. 15710*, 91st Cong., 2d Sess. 181-182 (1970), and even more particularly at equipment regulations and safety standards which relate directly to implementation of vessel traffic systems. See, e.g., Testimony of John Reed, Chair-

<sup>3</sup>46 U.S.C. § 170(7)(d) provided:

"Nothing contained in this section shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted, which are not inconsistent or in conflict with this section or the regulations of the Commandant of the Coast Guard established hereunder."

man of the National Transportation Safety Board, in *Hearings Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries on H.R. 867, H.R. 3635, H.R. 8140, and H.R. 6232*, 92nd Cong., 1st Sess. 348-349 (1971). None of the elements of Chapter 125 falls in such categories. Thus, any conclusion that Title I of the PWSA was intended to be preemptive as to the matters at issue in this case is unwarranted.

For its part, the legislative history of Title II of the PWSA is wholly silent on the question of pre-emption. There is no question that Title II of the PWSA was intended to establish a "comprehensive" scheme of federal tanker regulation. S. Rep. No. 92-724, 92nd Cong., 2d Sess., 1972, U.S. Code, Cong. and Ad. News 2766, 2774. But an intent to be comprehensive cannot be equated with an intent to preempt. See, e.g., *New York State Department of Public Services v. Dublino*, 413 U.S. 405 (1973); *DeCanas v. Bica*, 424 U.S. 351 (1976). This issue was not focused upon during the course of the Senate Commerce Committee's hearings, see *Hearings Before the Senate Commerce Committee and S. 2074*, 92nd Cong., 1st Sess. (1971); it is not mentioned in the Senate Report on the PWSA; and it was not alluded to during either Senate or House considera-  
tion of the legislation on the floor. See 118 Cong. Rec., S. 5192, S. 10244, H. 6231, Daily Edition 1972 (March 30, June 25, June 28, 1972).

While Appellees would derive a preemptive intent from the Tank Vessel Act of 1936, 49 Stat. 1889, such an argument is without foundation, for the 1936 Act did not contain any expression of federal preemption of state power.

## **II. Chapter 125 Is Not Inconsistent with the PWSA's Objective of Encouraging International Agreement**

Appellees' suggestion that Chapter 125 upsets the PWSA's goal of encouraging international agreement is wrong for at least two reasons:

*First*, while it is correct that Congress felt that adequate international regulation of tanker source pollution was a desirable goal, the primary thrust of the PWSA is to protect the domestic marine environment by all appropriate means. The PWSA does not commit the United States to an exclusive international regime. Rather, the Senate Commerce Committee, in its Report on the PWSA, made it clear that environmental protection should not be "sacrificed" on the principle of international regulation. S. Rep. No. 92-724, 92nd Cong., 2d Sess., 1972 U.S. Code, Cong. & Ad. News 2766, 2783, 2788.

*Second*, it cannot be emphasized strongly enough that Chapter 125 does not involve the "unilateral imposition" of standards on foreign flag tankers in such a way as to upset the process of achieving desirable, international standards for vessel source

pollution. Foreign flag tankers smaller than 125,000 deadweight tons, regardless of their design or equipment, are perfectly free to trade in Puget Sound if they take state pilots and tug escorts. Moreover, the exclusion of supertankers from Puget Sound is unrelated to design, construction, and equipment requirements of the sort embodied in international agreements and thus in no way impinges on U.S. efforts to promote the adoption of such agreements. Finally, local provisions, based upon local environmental conditions, pose far different questions internationally than a general requirement applicable to *all* vessels entering *all* U.S. navigable waters. It was in fact recognized by a wide group of countries at the time of the last major international pollution negotiation in 1973 that specialized standards are often warranted in areas of special environmental sensitivity. See Report of the United States Delegation to the International Conference on Marine Pollution, 1973, at page 18.

### **III. The Immunity Given to the State from Certain Suits Has Not Been Removed by Either Federal or State Law**

Appellees are wide of the mark in their response to Appellants' request for review of the lower court's conclusion that the suit below was not a suit against the State for purposes of the Eleventh Amendment.

First, Appellants have suggested various reasons, too extensive to set out here but discussed in

a memorandum to the Court below, why *Ex parte Young*, 209 U.S. 123 (1908), can and should be interpreted so as not to deny to the State, in this case, the protection guaranteed it by the Eleventh Amendment. Second, Appellees have never argued that Chapter 125 violates any rights guaranteed them by the Fourteenth Amendment (or by any other of the Civil War Amendments). Rather they contend the chapter violates federal rights provided them under, among others, the Commerce Clause and the Supremacy Clause. Appellees here are not in a position, therefore, to invoke the principle of *Ex parte Young*, *supra*, "which permitted suits against state officials to obtain prospective relief against violations of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, U.S. ..., 49 L. Ed. 2d 614, 619, 96 S.Ct. 2666 (1976). See also *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). Cf. *National League of Cities v. Usery*, U.S. ..., 49 L. Ed. 2d 245, 96 S.Ct. 2465 (1976). Third, the holding of Washington law cited by Appellees and set out in *Hanson v. Hutt*, 83 Wash. 2d 195, 202, 517 P.2d 599, 604 (1974), simply stands for the principle that suits brought in state courts challenging a statute's constitutionality may be brought in counties other than Thurston County, in which the State capital is located. The *Hutt* case does not stand for the proposition that Washington law provides that the Eleventh Amendment gives the State no immunity from certain suits brought in federal district court. The reason that the State is here

protected by the Eleventh Amendment is that the Appellees are not protected by *Ex parte Young*, *supra*.

### CONCLUSION

Appellees have asked that this Court summarily affirm the holding of the court below, as it did in *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). The decision below in this case differs from that rendered in *Northern States Power Co.*, *supra*, in two important respects relevant to Appellees' request here. First, there the lower court took some pains to examine and analyze the legislative history of the applicable federal statutes; here the court did not. See Opinion of District Court, found at Appendix C, Appellants' Jurisdictional Statement. Second, in *Northern States Power Co.* the lower court found that the federal statute and its legislative history provided "the strongest manifestation of Congressional intent to preempt the field of regulation" of nuclear reactors, *Northern States Power Co.*, *supra* at 1152; here there is no comparable manifestation.

Appellants respectfully submit that Appellees' motion to affirm should be denied, and that the Court should note jurisdiction of the appeal.

Dated: February 14, 1977.

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MAY 14 1977

MICHAEL PODAK, JR., CLERK

IN THE  
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OF THE  
**UNITED STATES**  
OCTOBER TERM  
No. 76-930

DIXY LEE RAY, Governor of the State of Washington;  
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Appellants,

v.

ATLANTIC RICHFIELD COMPANY, and SEATRAIN LINES, INC..

Appellees.

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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

October Term, 1976

No. 76-930

DIXY LEE RAY, Governor of the  
State of Washington, et al.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, et al.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON

**BRIEF OF APPELLANTS**

**OPINION BELOW**

The opinion of the three-judge district court is reported in *Atlantic Richfield Company v. Evans*, F. Supp. ..., 9 E.R.C. 1876 (W.D. Wash., 1977). A copy of the opinion is included in the Jurisdictional Statement as Appendix C, pages 5a through 12a.

## JURISDICTION

This is a direct appeal from an order granting a permanent injunction issued pursuant to 28 U.S.C. §§ 2281 and 2284 against enforcement of a state statute. The order was entered by the United States District Court for the Western District of Washington November 12, 1976, and is set forth in the Jurisdictional Statement as Appendix B, p. 3a. Notice of appeal was filed in the United States District Court, Western District of Washington, on November 19, 1976, and is set forth in the Jurisdictional Statement as Appendix E, pp. 14a-20a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253, which authorizes an appeal to the Court from such an order of a three-judge district court. *Moe v. Confederated Salish and Kootenai Tribes, Etc.*, 421 U.S. 707 (1976). The Court noted probable jurisdiction on February 28, 1977. 97 S. Ct. 1172 (1977).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The primary constitutional and statutory provisions involved in this case are the Supremacy and Commerce Clauses of the United States Constitution (Article VI, Clause 2; Article I, Section 8, Clause 3); Chapter 125, Laws of Washington, 1975, First Extraordinary Session, codified at Wash. Rev. Code §§ 88.16.170 *et seq.* ("Chapter 125"); and the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424, 33 U.S.C. §§ 1221 *et seq.*, and 46 U.S.C. § 391a (the "PWSA"). They are set forth

in the Jurisdictional Statement as Appendix G, H, I, and J, respectively.

Other provisions of the United States Constitution involved are the Treaty Making Clause (Article II, Section 2, Clause 2) and Amendment XI to the United States Constitution. They are set forth in the Jurisdictional Statement at Appendix K and L, respectively.

## QUESTIONS PRESENTED

In 1975 the State of Washington enacted legislation, Chapter 125, designed to protect certain highly valued and economically important navigable waters, their underlying beds and adjoining shorelines of the State of Washington against damage arising from spills of oil carried, in very substantial quantities, by large oil tankers. This appeal presents the following principal question:

Whether the historic police powers of a state to protect its citizens and navigable water resources from oil pollution, by ensuring safe methods of oil transportation by tankers in its inland marine waters, have been wholly ousted by the Ports and Waterways Safety Act of 1972—a federal statute which does not express an explicit intent to do so and which creates a scheme compatible with continuing state regulation?

Related questions before the District Court, but not answered by the Court, are:

Whether Chapter 125 is invalid on the basis it impermissibly conflicts with:

1. Other federal statutes affecting oil tankers,
2. International agreements, or
3. The Commerce Clause.

A final question presented is:

Whether, in light of the Eleventh Amendment to the United States Constitution, the District Court erred in denying a motion to dismiss the defendant officials of the State of Washington, Governor Dixy Lee Ray, et al.?

#### STATEMENT OF THE CASE

##### A. Parties And Prior Proceedings

Chapter 125 became effective on September 8, 1975. On the same day, Atlantic Richfield Company ("ARCO"), which owns and operates an oil refinery and related facilities at Cherry Point, Washington, filed a Complaint in the United States District Court for the Western District of Washington seeking a judgment declaring the State statute unconstitutional and void, and enjoining its enforcement. Named as defendants were State officials responsible for enforcement of Chapter 125, including Daniel J. Evans, Governor of the State of Washington,<sup>1</sup> Slade Gorton, Attorney General of the State of Washington, the five members of the Board of Pilotage

<sup>1</sup>On January 12, 1977, Dixy Lee Ray became Governor of the State of Washington and John C. Hewitt became chairman of the Board of Pilotage Commissioners. Pursuant to Rule 48(3) of the Rules of the Supreme Court, they have been substituted respectively as appellants for former Governor Evans and for James Rondeau, successor of William C. Jacobs.

Commissioners of Washington and David S. McEachran, Prosecuting Attorney of Whatcom County, the county in which ARCO's refinery is located.<sup>2</sup>

All who are acquainted with the State of Washington know of Puget Sound and its great significance to the essential character of the State and its citizens.<sup>3</sup> The case involves the validity of a state legislative enactment designed to protect Puget Sound, its waters, beds and adjacent uplands, from damage arising from the spillage of oil carried by extremely large oil tankers as they ply Puget Sound and adjacent waters. Chapter 125 provides, in its first section, the following findings:

Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.

The legislature also recognizes Puget Sound and adjacent waters are a relatively confined salt water environment with irregular shorelines

<sup>2</sup>Christopher T. Bayley, Prosecuting Attorney of King County, and four non-profit environmental organizations—National Wildlife Federation, Sierra Club, Environmental Defense Fund, Inc. and Coalition Against Oil Pollution, intervened as defendants in the District Court. Seatrain Lines, Inc. (Seatrain) intervened as a plaintiff in the District Court, Seatrain, a Delaware corporation with its principal place of business in New York, builds, owns and operates vessels.

<sup>3</sup>"Puget Sound" is described for purposes of this proceeding as that area including the marine waters within the State of Washington lying east of a line drawn from Discovery Island Light (on the southern tip of Vancouver Island, British Columbia) to the new Dungeness Light (approximately halfway between Port Townsend and Port Angeles, Washington). A map setting forth the western one-third of the State of Washington, including Puget Sound, is attached to the inside back cover of this brief.

and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.

The legislature further recognizes that certain areas of Puget Sound and adjacent waters have limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.

Section 1 closes by describing the "intent and purpose" of the chapter to be:

[T]o decrease the likelihood of oil spills on Puget Sound and its shorelines.

The means provided to reach this "intent and purpose" are three:

1. Section 2 thereof requires that "... \* \* any oil tanker \* \* \* of fifty thousand deadweight tons or greater, shall be required to take a Washington State licensed pilot while navigating Puget Sound \* \* \*." Wash. Rev. Code § 88.16.180.

2. Section 3(1), the "access limit", prohibits any oil tanker of more than 125,000 deadweight tons (DWT) from entering Puget Sound. Wash. Rev. Code § 88.16.190(1).

3. Section 3(2) provides that an oil tanker of 40,000 to 125,000 DWT may enter Puget Sound if it either:

(a) Possesses the following safety features: minimum shaft horsepower of at least one horsepower for each 2.5 DWT; twin screws;

<sup>4</sup>The term "deadweight tons" is defined by the Washington State Board of Pilotage Commissioners for purposes of Chapter 125 as the cargo-carrying capacity of a vessel, including necessary fuel oils, stores, and potable water, as expressed in long tons (2240 pounds equals one long ton).

double bottoms underneath all oil and liquid cargo spaces; two radars, one of which must be collision-avoidance radar; and any other navigational systems as may be prescribed by the Board of Pilotage Commissioners; or

(b) Is "... \* \* under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent \* \* \*" of its deadweight tonnage ("tug escort"); or,

(c) Is in ballast. Wash. Rev. Code § 88.16.190(2).

The provisions of Chapter 125 are precisely drawn to address problems of large oil tanker movement on Puget Sound. The principal operative provision is the "tug escort." In practice, tankers have not incorporated the alternative design and equipment features of Section 3(2), Chapter 125. These design and equipment features are optional under the state regulatory scheme; in essence they constitute a legislative expression of what the State would like to see incorporated on tankers used in Puget Sound in order to protect these ecologically sensitive waters. Since September 8, 1975, the effective date of Chapter 125, all tankers between 40,000 and 125,000 DWT have used tug escorts; no tanker has been denied entry to Puget Sound for failure to have the alternative design features of Section 3(2).

The other operative provision of Chapter 125 is the access limit. The access limit reflects the State's concern about the movement of supertankers in the confined waters of Puget Sound.

ARCO's primary claims were that Chapter 125

was invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2), because it had been preempted by federal law, particularly the PWSA, and that Chapter 125 imposed an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).<sup>5</sup> ARCO also claimed Chapter 125 was invalid based upon federal foreign affairs and treaty-making powers. Because the action sought injunctive relief against enforcement of a state statute on the grounds of unconstitutionality, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284, to determine the case.

Although ARCO in its Complaint requested a temporary injunction, it did not pursue that request and no preliminary relief was issued by the District Court. ARCO continued to comply with Chapter 125 during the pendency of the litigation in the District Court.

The District Court heard the case on June 25, 1976, upon an agreed statement of facts.

On September 23, 1975, the District Court, relying upon the PWSA, held that Chapter 125 was void on the basis that federal law has "preempted the field."<sup>6</sup> (Juris. St., App. C, p. 7a). The District Court

<sup>5</sup>ARCO's challenge relies in large measure upon the Ports and Waterways Safety Act of 1972. That act authorizes the Coast Guard to establish vessel traffic systems in selected ports and waterways (Title I) and to impose minimum standards for the design, construction and operation of oil tankers (Title II). The Act's provisions are discussed in detail *infra*.

<sup>6</sup>The District Court also held, contrary to the contention of the defendant officials of the State of Washington, that the Eleventh

did not "reach" the other contentions raised by ARCO. (Juris. St., App. C, p. 12a). A judgment declaring Chapter 125 invalid was entered on September 24, 1976.

The District Court on November 12, 1976, entered an order enjoining the enforcement of Chapter 125.<sup>7</sup> At the request of the Appellants, the District Court stayed the effectiveness of the injunction until December 15, 1976. The Appellants by application filed with this Court on December 6, 1976, sought a further stay of the mandate of the District Court. On December 9, 1976, Mr. Justice Rehnquist referred the application for a stay to the full Court at the conference following December 10, 1976, and continued the stay of the District Court's mandate pending further order. On January 10, 1977, the full Court granted the stay pending final disposition of the appeal by the Court.<sup>8</sup>

All Appellants request that the Court reverse the District Court decision by holding that Chapter

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Amendment of the United States Constitution did not preclude the District Court's jurisdiction. In so ruling, the District Court wrote:

Aware of the rule in *Ex Parte Young*, 209 U.S. 123 (1908), the State invites us to "overrule" it, or at least to restrict the scope of cases falling within the Young "exception" to the Eleventh Amendment. The invitation is attractively and persuasively argued, but we decline it. The Supreme Court, if it chooses to do so, will have ample opportunity to reconsider *Young*. (Juris. St., App. C, p. 11a.)

<sup>7</sup>See the Order of the District Court, dated November 12, 1976. (Juris. St., App. B, p. 3a.)

<sup>8</sup>The order of Justice Rehnquist, dated December 9, 1976, and the Order of this Court, dated January 10, 1977 appear at (A. 370) and (A. 373), respectively ..... U.S. ...., 97 S. Ct. 544 (1976), .... U.S. ...., 97 S. Ct. 729 (1977).

125 is valid.<sup>9</sup> In addition, the State of Washington appellants, Governor Dixy Lee Ray, et al., request that the Court reverse the District Court's conclusion it had jurisdiction over them.

#### B. Puget Sound And Its Adjacent Shorelands.

##### 1. Physical environment.

Puget Sound is a beautiful and extremely valuable body of inland water located in northwest Washington. Connected to the Pacific Ocean and Washington's seacoast by the 75 mile long Strait of Juan de Fuca, its sinuous arms penetrate deeply into Western Washington. Puget Sound is an estuary<sup>10</sup> consisting of 2500 square miles of inlets, bays and channels; in its northern part are the San Juans, the

<sup>9</sup>Appellants do not challenge that part of the lower court decision which held invalid that portion of Section 2 of Chapter 125 which required "enrolled vessels," i.e., vessels engaged in trade between United States ports, to take state licensed pilots. Appellants recognize that the interaction of 46 U.S.C. § 215 and 46 U.S.C. § 364, as construed by the Court, see *Sprague v. Thompson*, 118 U.S. 92, 95-96 (1886) and *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187 (1912), precludes regulation of pilotage on such vessels. It must be emphasized that the pilotage requirement of Section 2 is plainly valid insofar as it is applied to "registered" vessels; i.e., vessels trading between United States and foreign ports whether flying United States or foreign flags. Moreover, under the Court's decision in *Anderson v. Pacific Coast Steamship Co.*, *supra*, the Washington State pilotage requirement may be applied to vessels in coastwise trade, carrying federally licensed pilots aboard, if such vessels are "registered." This minor defect in Chapter 125 has no detrimental impact upon the validity of the remainder of the Chapter because of the long recognized and firmly established concept of severability embodied in Washington State law and the "severability clause" of the 1975 state enactment. Section 6, Chapter 125, Laws of Washington, 1975 1st Ex. Sess.; *State v. Anderson*, 81 Wn.2d 234, 501 P.2d 184 (1972); *Boeing Co. v. State*, 74 Wn.2d 82, 442 P.2d 970 (1968).

<sup>10</sup>Estuaries are zones of ecological transition between fresh and salt water. There is water and light in the estuarine zone, together with dissolved nutrients derived from both land and sea. (A. 68.)

State's magnificent and unique island cluster. More than 200 islands are found throughout Puget Sound, and numerous marshes, tidal flats, wetlands and narrow beaches, often backed by cliffs, are characteristic of the more than 2,000 miles of shoreline. The distinctive topographic characteristics of Puget Sound are shared by no other large estuarine system in the United States outside of Alaska<sup>11</sup> (A. 69.)

##### 2. The multiple values and uses of Puget Sound.

The importance of Puget Sound to Washington arises both from its estuarine character and its proximity to Washington's residents. It provides highly productive habitats and serves as spawning and nursery areas for over 2,000 different marine species.<sup>12</sup> (A. 68, 69.) Further, Puget Sound provides year round as well as migratory habitats for waterfowl and wintering areas for waterfowl from Alaska, Western Canada and Eastern Russia.<sup>13</sup> (A. 72.)

Additionally, the waters and shorelines of Puget Sound provide employment, recreational, scientific and educational opportunities and support navigation, commerce and other water related economic uses. Since approximately 65% of Washington's citizens reside within the twelve counties which border on Puget Sound, its waters and shorelines are

<sup>11</sup>The only other comparable estuarine systems are Cook Inlet, Prince William Sound and Alexander Archipelago, all in Alaska.

<sup>12</sup>For example, resident mammals include whales, sea lions, seals and porpoises. (A. 72.)

<sup>13</sup>Puget Sound is one of the habitats in the United States of the Bald Eagle. Larrison and Sonnenberg. *Washington Birds*, (90-91) (1968).

accessible to and subject to multiple, and at times competing, uses. (A. 73, 75.)

Washington and its citizens have a substantial economic interest in the natural resources of Puget Sound. The value of the beds, tidelands and waterfront lands adjacent to Puget Sound are estimated to exceed \$2,000,000,000.<sup>14</sup> (A. 73.) The State has a substantial proprietary interest in these lands, owning nearly all of the beds and approximately 43% of the tideland frontage. (A. 73.) The Puget Sound fisheries industry, including commercial and sport fishing, packing and canning, contributes \$170,000,000 annually to Washington's economy.<sup>15</sup> (A. 71.) Puget Sound also supports aquaculture programs, including commercial clam and oyster farming and salmon rearing.<sup>16</sup>

Puget Sound and its adjacent uplands are also significant recreational resources for the State, supporting tourism<sup>17</sup> and resident recreational activities

<sup>14</sup>This valuation excludes all industrial, commercial and residential improvements. (A. 73.)

<sup>15</sup>These figures are based on State of Washington estimates for 1973, including finfish harvest (e.g. salmon, steelhead, herring, smelt and lingcod) and shellfish harvest (e.g. crab, oyster, clam and octopus). (A. 71.)

<sup>16</sup>For example, the Lummi Indian Tribe conducts an aquaculture program for the propagation and sale of salmon, steelhead, trout, and oysters at a site only five miles from ARCO's refinery. The federal government has expended a total of \$3.4 million dollars on behalf of the aquaculture program of the Tribe. (A. 72.) Total employment in the State in the aquaculture industry is approximately 1250-1500. (A. 72.)

<sup>17</sup>The State of Washington estimates in 1973 that \$92.1 million was spent by tourists in the twelve counties adjacent to Puget Sound. (A. 74.)

such as boating, swimming, water skiing and scuba diving. Puget Sound residents own a multitude of pleasure boats and in the summer literally thousands of these craft are cruising throughout Puget Sound. Access to the Sound is provided in part by 158 federal, state and local parks and recreation sites. (A. 74.)

Puget Sound is the site of a number of fish and wildlife preserves, including 13 federal refuges, 2 state oyster preserves and 4 bird refuges operated by a non-profit conservation organization. (A. 74.) In addition, a number of colleges and universities, state agencies and the National Oceanic and Atmospheric Administration conduct research and educational programs through marine stations located in Puget Sound.<sup>18</sup>

### 3. Oil transport on Puget Sound.

Located on the uplands adjacent to Puget Sound are six oil refineries. (A. 44-45, 47-48.) These refineries have a total combined processing capacity of 359,500 barrels of oil per day. (A. 44-45, 47-48.) The four largest, including ARCO's at Cherry Point, are situated in northern Puget Sound, which contains most of the Sound's 200 islands, passes and channels (map).

The refineries are supplied by tankers which carry vast quantities of oil. A tanker of 120,000 DWT

<sup>18</sup>The University of Washington annually spends \$1 million on its Institute of Marine Studies at Friday Harbor on San Juan Island. Its marine station borders the main oil shipping route to ARCO's refinery. Several other marine stations are located near Puget Sound oil refineries. (A. 75, and Exhibit G.)

has the capacity to carry approximately 34,500,000 gallons of oil.<sup>19</sup> (A. 45, 80.) The tanker route through Puget Sound to ARCO's refinery is through Rosario Strait, one of the narrowest shipping channels in the Sound.<sup>20</sup> (A. 64, and Ex. G.) Further, there are depth limitations on supertankers.<sup>21</sup> Portions of the shipping route to ARCO's refinery have a depth of only 60 feet. (A. 65.) Five of the six refineries on Puget Sound cannot dock a tanker greater than 125,000 DWT because the dockside depth will not accommodate the draft of such a vessel. (A. 47-48, 80.) Only ARCO can receive tankers greater than 125,000 DWT, but it is also restricted by a dockside depth of 55 feet. (A. 55.) The natural navigational hazards, as well as the "high density of commercial and pleasure boat traffic," Chapter 125, Section 1. (Wash. Rev. Code § 88.16.170) are compounded

<sup>19</sup>A tanker of the 40,000 to 125,000 DWT class is huge. For example, a 120,000 DWT tanker has an approximate draft of 52 feet, a width of 138 feet and a length of 850 feet, almost three times longer than an American football field. Further, the immensity of the supertankers excluded from Puget Sound by Chapter 125, i.e., those greater than 125,000 DWT, is difficult for most people to comprehend. (A. 80.) The general physical dimensions of an "oil-berg" of 250,000 DWT is 1,085 feet long by 170 feet wide, with a draft of 65 feet. Vessels of this class dwarf more well-known ships such as the "Queen Mary" (81,237 DWT). 25 Encyclopedia Americana 544 (1962). The Court had occasion to consider the size of these oil tankers, noting that ship officers have been issued bicycles to patrol the decks of a 166,890 ton oil tanker. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 340 (1973).

<sup>20</sup>At its narrowest point the Rosario Strait passageway is less than one-half mile wide. (Ex. G.)

<sup>21</sup>A 120,000 DWT tanker has a draft of 52 feet and a 190,000 DWT tanker has a draft of 61 feet. (A. 80.) Vessel draft refers to the distance the hull extends below the waters' surface.

by tidal currents, fog and visibility limitations and prevailing winds. (A. 69, and Exs. G and I.)

These tankers are remarkable for their lack of maneuverability. Congress noted the "propulsion units [on 250,000 ton tankers are] the equivalent to a one-third horsepower motor on a 40-foot boat." S. Rep. No. 92-724, 92d Cong., 1st Sess. 18 (1972). ("PWSA Senate Report"). The stopping distance of 120,000 and 190,000 DWT tankers at 16 knots is almost two and one-half and three and one-half miles respectively. (A. 80.) Congress also noted that during a "crash stop" procedure, the vessel cannot be adequately steered." PWSA Senate Report at 18.

The vast amounts of oil carried by tankers, plus the problems of maneuverability in the face of navigational obstacles on Puget Sound, create substantial risks of oil pollution. In the year preceding enactment of Chapter 125, three oil tanker polluting incidents of major proportion occurred worldwide. (A. 81.) And things are getting worse, not better. On January 11 of this year, Chairman Magnuson in his opening remarks in the Hearings on Recent Tanker Accidents before the Senate Commerce Committee, 95th Cong., 1st Sess., 1-2, ser. 95-4 (1977), made two alarming observations:

[T]his country has just witnessed the worst rash of tanker accidents ever.

He continued with this sad statement:

And on top of that, last year was the worst for

vessel losses in history. These ships seem to be going down everywhere.

Those of us who have studied this area closely feel that the worst may be yet to come. In other words, what is possible is going to happen. \* \* \* \* Harbors are congested; our vital waterways are dangerously crowded. \* \* \* \*

In the first nine months of 1976, prior to the calamities of the winter of 1976-77, nearly 200,000 tons of oil were spilled—more than in any previous year.<sup>22</sup> Few incidents have brought home the reality of the risks of oil spills more than the grounding of the Argo Merchant, which spilled approximately 7.3 million gallons off Nantucket Island, Massachusetts.

Fortunately, Puget Sound has not yet experienced a major oil spill. However, there have been at least 13 tanker casualties and there have been oil spills by tankers in transit and at dockside on Puget Sound. (A. 121-122, and Ex. P.) Moreover, Alaskan oil is expected to begin flowing in 1977. The oil industry plans to transport by tanker 15% of the Alaskan oil to the Puget Sound area. (A. 49.) Thus, the potential for a disastrous spill is ever present and growing.

An oil spill on Puget Sound has significant potential for destruction of or damage to the marine life of Puget Sound, industry and jobs dependent thereon, as well as damage to publicly and privately owned property. (A. 76.) The National Academy

<sup>22</sup>Tanker Advisory Center, Worldwide Tanker Casualty Returns: Third Quarter 1976 (December 23, 1976). Hearings on Recent Tanker Accidents before the Senate Commerce Committee, 95th Cong., 1st Sess., 244-47, ser. 95-4 (1977).

of Sciences has found estuaries, such as Puget Sound, are "particularly vulnerable" to oil spill damages.

(A. 79.) While the extent of damages to natural resources varies with the circumstances of a particular oil spill, the greater the amount of oil spilled, the greater is the potential injury, death or damage.

(A. 76.) The spillage of oil may impair Puget Sound waters, beaches and shorelines for a number of public uses. (A. 76.) Since the Sound contains numerous islands and irregular shorelines, oil may quickly reach beaches and the shore. It is unknown whether a spill on Puget Sound greater than approximately 476 barrels can be contained and cleaned up without significant property damage first occurring.

(A. 84.) Even a spill contained prior to reaching shore may cause economic and environmental damage, as well as high costs of cleanup.<sup>23</sup>

#### 4. Washington State has responded to the risk of oil spillage.

Protection of Puget Sound from oil pollution has been and is now the centerpiece of Washington's effort to preserve water quality. Over the past ten years, the State has enacted extensive legislation to protect the Sound,<sup>24</sup> and federal, state and local gov-

<sup>23</sup>There has been one spill on Puget Sound of approximately 476 barrels (20,000 gallons). The cleanup cost for this spill exceeded \$50,000. (A. 84.)

<sup>24</sup>Following the mandates of federal water pollution control laws, the State established substantially all of the waters of Puget Sound as Class AA "extraordinary" waters—the highest classification given to any waters. Washington Administrative Code § 173-201-080(120). After this designation, the State set upon establishing an integrated program of insuring the integrity of Puget Sound's water

ernments have expended hundreds of millions of dollars to enhance the Sound's water quality. In 1975, in response to increasing traffic of large oil tankers and the navigational constraints of Puget Sound, the State adopted Chapter 125. The scheme of protection against oil spill risks contemplated by Chapter 125 is an integral part of the overall effort of the State of Washington to preserve and enhance the environmental quality of Puget Sound.

#### **5. The impact of Chapter 125 on oil transportation on Puget Sound.**

Because ARCO and others have complied with Chapter 125 since September 8, 1975, appreciation of the impact of Chapter 125 on oil tanker operations is based in part on actual experience. Chapter 125 has not caused any reduction in the amount of oil processed at any Puget Sound refinery. (A. 68.) The Puget Sound refineries are being fully supplied by tankers of less than 125,000 DWT. Since these tank-

against the threat from oil spills. In rapid succession, during 1969 through 1971, the State established an oil spill clean-up capability (Wash. Rev. Code § 90.48.330), strict liability for damages caused by oil spills (Wash. Rev. Code § 90.48.335), and the regulation of the " \* \* \* times, places and methods \* \* \* of transferring of oil from ship to shore (Wash. Rev. Code 90.48.380). Further, the Shoreline Management Act of 1971 designates most of Puget Sound a "shoreline of statewide significance" where drilling for oil is prohibited. (Wash. Rev. Code § 90.58.030(2)(3); and Wash. Rev. Code § 90.58.160.) As part of the State's continuing effort to prevent and control oil pollution, "a continuing, comprehensive program of systematic baseline studies" of Puget Sound and other State marine waters was established in 1973. Wash. Rev. Code § 43.21A-.410. This long-term effort was coupled with the authorization of a feasibility study of "offshore monobuoy and related petroleum facilities." Section 14, Chapter 197, Laws of Washington, 1974, First Ex. Sess.

ers do not possess the design and equipment features enumerated in Section 3(2) of Chapter 125, (Wash. Rev. Code § 88.16.190), oil tankers between 40,000 DWT and 125,000 DWT are using the alternative compliance mechanism of tug escorts while navigating Puget Sound. The cost of compliance for those tankers is only the cost of tug escort. Tankers calling at ARCO's refinery have experienced a tug escort fee of approximately \$7,500, or \$.0087 per barrel, for a 120,000 DWT tanker. (A. 68.) This cost compares with the total transportation cost of crude oil from Valdez, Alaska to Puget Sound of approximately \$.40 per barrel and from the Persian Gulf to Puget Sound of \$1.40 per barrel for a 120,000 DWT tanker. (A. 63, 64.)

Chapter 125, as a practical matter, has had and will continue to have little impact on supertanker use on Puget Sound. Prior to the effective date of Chapter 125, only six vessels (15 calls) greater than 125,000 DWT ever entered Puget Sound. (A. 46, 113.) The largest of these supertankers was a 138,000 DWT vessel. (A. 113.) ARCO, the only Puget Sound refinery able to handle 125,000 DWT tankers, intends to supply its entire refinery capacity with Alaskan oil beginning in 1977. (A. 45, 49.) By law, this Alaskan oil must be shipped to Puget Sound by United States flag vessels. (A. 88.) In the whole United States flag fleet, there are only four tankers greater than 125,000 DWT. (A. 58-59.) ARCO has never used and does not intend to use these four

tankers to serve its Puget Sound refinery. (A. 59.) Rather, ARCO intends to use seven existing tankers in the Alaska-West Coast trade, none of which is greater than 125,000 DWT.<sup>25</sup> (A. 50.)

Chapter 125 is a statute of modest impact on oil transportation through Puget Sound. Chapter 125 is a State police power exercise which, by striking a balance between competing land and water uses on Puget Sound, is designed to protect extremely valuable resources against the very great risks of oil spills.

#### SUMMARY OF ARGUMENT

Chapter 125 is a valid exercise of the State of Washington's police power, which is not in conflict with and not expressly or implicitly preempted by the Ports and Waterways Safety Act. Chapter 125 is part of a comprehensive State effort, encouraged by a variety of federal legislation, to preserve and promote the environmental integrity and associated economic and human values of a delicate inland marine waterbody, *i.e.*, Puget Sound. The provisions of Chapter 125 are tailored to the local conditions and values of Puget Sound for the purpose of reducing the substantial risks of oil spillage from tankers.

<sup>25</sup>ARCO has contracted for construction of two tankers of 150,000 DWT which are intended for West Coast Trade. (A. 50.) Alaskan oil is intended for Long Beach, California and San Francisco, California, as well as Puget Sound. (A. 49.) There are presently monobuoys off the coast of California near Long Beach, one of which can accommodate tankers with a draft of 56 feet. (A. 50.) The two tankers of 150,000 DWT which have been contracted for by ARCO will have a draft of 55 feet. (A. 50.)

It is undisputed that all oil tankers navigating Puget Sound can comply with all federal regulations as well as with Chapter 125. Full compliance with both federal and state regulation has occurred since September 8, 1975, the effective date of Chapter 125.

Congress did not expressly preempt Chapter 125. Neither the language nor the legislative history of the PWSA contains the required clear and manifest indication of preemptive intent. Title I of the PWSA, which provides the Coast Guard with discretionary power to establish vessel traffic systems in congested waters, expressly recognizes and contemplates continued regulation in local waters by state and local authorities. Indeed, a number of existing local traffic control schemes were called to the attention of Congress prior to enactment of the PWSA, and Congress did not indicate when adopting the PWSA that such local control was precluded. While one section of Title I, which preserves state authority to set higher standards for onshore structures, may preclude by implication some aspect of state authority over vessels, the provisions of Chapter 125 are not embraced within even the broadest reading of any negative implication of this section. The types of controls contained in Chapter 125 are unrelated to the vessel traffic system which the Coast Guard has established for portions of Puget Sound. Title II of the PWSA contains no language of preemption. In fact, its reference to the "minimum standards" to be set by the Coast Guard strongly

suggests other governmental bodies, such as states, may set more stringent requirements to meet local conditions.

Chapter 125 is not implicitly preempted. The PWSA does not constitute a pervasive federal scheme which leaves no room for supplemental state action. Even if the PWSA were construed as granting broad authority to the Coast Guard to act in certain ports and waters, that grant of authority in itself cannot be deemed as demonstrating a congressional intent to oust all state regulation. Given the scope of the oil tanker pollution problem, comprehensive federal authority is both likely and appropriate wholly apart from any preemptive intent. Significantly, neither the PWSA nor its implementation is all-inclusive. Chapter 125 is a response to the particular navigational hazards of Puget Sound and has no impact on any national transportation system. Further, the goals of Chapter 125 and the PWSA are similar, and the provisions of Washington's law support, rather than obstruct, federal efforts to protect marine environments from the risks of oil pollution.

Far from reflecting a "Balkanization" of regulatory authority, Chapter 125 is the kind of creative state effort, consistent with and supplemental to federal efforts, needed in a healthy federal system.

The District Court did not reach several claims raised below by ARCO. If it had, it would have found that Chapter 125 is consistent with all federal laws dealing with certification and registration of

vessels and the Merchant Marine Act. Similarly, since the type of regulation contained in Chapter 125 is not the subject of any treaty or convention, Chapter 125 does not interfere with international agreements or the ability to conduct foreign affairs. Further, Chapter 125 does not interfere with any needed uniformity in or create an impermissible burden on interstate commerce.

Finally, the appellant State of Washington public officials contend that the Eleventh Amendment to the Constitution precluded the federal district court from entertaining ARCO's challenge to the validity of Chapter 125.

#### ARGUMENT

##### **I. CHAPTER 125 IS NOT IN CONFLICT WITH AND HAS NOT BEEN EXPRESSLY OR IMPLICITLY PREEMPTED BY THE PORTS AND WATERWAYS SAFETY ACT.**

Pursuant to the Supremacy Clause of the Constitution, Article VI, Clause 2, state legislation is presumed valid unless an actual conflict exists between state and federal regulations or Congress curtails or totally ousts state regulation of a subject area. Congress may expressly preempt by so declaring in federal legislation. In addition, a court may find implicit in federal regulation a congressional intent to preempt even consistent or supplemental state regulation. However, in the absence of clear evidence of such congressional intent, the Tenth

Amendment to the Constitution preserves the authority of states to exercise their traditional police powers.

The District Court, construing the PWSA for the first time, held this statute preempted the entire field of oil tanker regulation. (Juris. Stat., App. C, p. 7a.) The sweeping preemption holding of the District Court radically upsets an area of traditional state authority, ousting coastal states from their historically recognized police powers over coastal and harbor uses to prevent oil pollution directly. The result of the District Court's holding is that state legislatures are stripped of vitally important powers to protect state resources and the jobs and industry dependent on those resources. Such a far-reaching result cannot have been, and indeed, was not intended by the framers of the PWSA.

Chapter 125 represents the exercise of the State of Washington's police power to conserve land and water resources and to promote the general welfare of its citizens by maintaining the quality of the State's waters.<sup>26</sup> The distribution of oil by tanker in the State involves inseparable land use, water use and water pollution problems. Normal tanker traffic, as well as casualties from oil spillage, substantially affect and may alter the use of both water and adjacent land. Traditionally, land use authority has been the prerogative of state government.<sup>27</sup> For ex-

<sup>26</sup>ARCO has never claimed that Chapter 125 is not a valid exercise of the police power of the State.

<sup>27</sup>See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

ample, the decision whether to allow an oil refinery and the authority to control its location, size and other features reside with state and local governments.<sup>28</sup> The District Court decision creates an inconsistent situation whereby state and local governments have absolute veto power over refinery location on Puget Sound to protect land and water resources, yet would be ousted of any authority to protect those same resources from hazards created by the transportation of crude oil across State waters to local refineries.

It is well recognized that innovative state environmental legislation, enacted by those who are often better equipped to resolve particular local problems, is integral to a healthy federal system. See, e.g., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Skiriotes v. Florida*, 313 U.S. 69 (1941);<sup>29</sup> cf., *National League of Cities v. Usery*, 426 U.S. 833 (1976).

The salutary power of the states to act does not

<sup>28</sup>ARCO submitted to zoning requirements in seeking a location for its Puget Sound refinery. The refinery location that ARCO previously sought in Snohomish County on Port Susan Bay was denied in 1969, and the denial upheld by the Washington State Supreme Court, because of its potential "detrimental effect on water and land resources." *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 872, 480 P.2d 489 (1971).

<sup>29</sup>Lower federal and state courts have reached similar conclusions. See, e.g., *Proctor & Gamble Co. v. Chicago*, 509 F.2d 69 (7th Cir.), cert. denied, 421 U.S. 978 (1975); *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Ore. App. 618, 517 P.2d 691 (1973); review denied. *Id.* at 691 (Ore. 1974); *Marshall v. Consumers Power Co.*, 66 Mich. App. 237, 237 N.W.2d 266 (1975).

stop at the water's edge. Since *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), the Court has consistently emphasized that the different needs and unique features of different port areas demand particularized local regulation.<sup>30</sup> Thus, for example, in *Packet Co. v. Catlettsburg*, 105 U.S. 559, 563 (1881), the Court upheld local harbor regulations prescribing times and locations for the landing of vessels, stating:

[The regulation] belongs also, manifestly, to that class of rules which, like pilotage and certain others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places, can be properly made.

State police power control of vessels is long-standing and extensive.<sup>31</sup>

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<sup>30</sup>The Court stated in *Cooley*, 53 U.S. (12 How.) at 320:

[T]he nature of the subject [pilotage] \* \* \* is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.

<sup>31</sup>See, e.g., *Morgan's S.S. Co. v. Louisiana Board of Health*, 118 U.S. 455 (1886) (upholding state maritime quarantine regulations); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1912) (upholding state pilotage requirements for "enrolled vessels" in coastwise trade which are "registered"); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (upholding state construction of a dam blocking navigable waters); *Escanaba Co. v. Chicago*, 107 U.S. 678 (1882) (upholding state construction of bridge partially obstructing traffic on navigable waters); *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882) (upholding local fees for wharfage imposed on vessels in interstate commerce); *Pound v. Turck*, 95 U.S. 459 (1877) (upholding state construction of dam blocking traffic on navigable river); see also *Kelly v. Washington*, 302 U.S. 1 (1937); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me.), appeal dismissed, 414 U.S. 1035 (1973).

Only four years ago, in upholding a state oil spill liability scheme, the Court termed oil spills:

[A]n insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.

*Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328-29 (1973).

Where a state has enacted legislation, such as Chapter 125, in an area of traditional state competence, the Court, in evaluating claims of preemption, begins with the strong presumption that the challenged statute is valid. The rule is that the:

[H]istoric police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *Jones v. Rath Packing Co.*, \_\_\_\_\_ U.S. \_\_\_\_\_, 97 S. Ct. 1305, 1309 (1977).

As the Court stressed again this term, this presumption of validity:

[P]rovides assurance that "the federal-state balance," *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts.

*Jones v. Rath Packing Co.*, *supra*, 97 S. Ct. at 1309.

Only a demonstration that complete ouster of state power—including the ouster of state power to promulgate laws not in conflict with federal laws—was plainly contemplated by Congress justifies a

conclusion that state regulation designed to protect vital state interests must give way to paramount federal legislation. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976). Preemption involves:

[T]he sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties \* \* \* [Therefore] [t]he proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

In essence, three inquiries are warranted to determine whether state regulation is precluded:

A. The Court must determine whether it is possible to comply with both the state and federal regulation. See, e.g., *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972), citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

B. The Court must determine whether Congress has "unmistakably \* \* \* ordained" that federal law alone is to regulate a particular subject matter. *Jones v. Rath Packing Co.*, 97 S. Ct. 1305, 1309 (1977), citing *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*.

C. The Court must determine whether, in the absence of conflict or express preemption, preemption should be inferred in light of the nature and scope of the federal regulatory scheme. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*.

Each case must necessarily turn on its own particular facts, e.g., "on the peculiarities and special features of the federal regulatory scheme in question." *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). In the instant case, not only is compliance with both federal and state regulation possible, but it is clear that Congress did not intend, either by express declaration or by implication, the complete ouster of state authority.

**A. There Is No Preemptive Conflict Between The Ports and Waterways Safety Act And Chapter 125 Because It Is Possible To Comply With Both Statutes.**

The rule as to the existence of actual conflict is stated in *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), to the effect a state statute cannot be upheld if there is found to be:

[S]uch actual conflict between the two schemes of regulation that both cannot stand in the same area.

374 U.S. at 430, citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

Actual conflict is only found where compliance with federal and state statutes is a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the "repugnance or conflict [is] direct and positive, so that the two acts could not be reconciled or consistently stand together." *Reid v. Colorado*, 187 U.S. 137, 148 (1902), citing *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 243 (1859).

The absence of actual conflict is demonstrated by full compliance of ARCO and others with both Chapter 125 and federal regulation since September 8, 1975, the effective date of Washington's law.<sup>32</sup> Obviously, the tug escort requirement and access limit for supertankers can stand consistently with the Puget Sound Vessel Traffic System (or "VTS") adopted by the Coast Guard. See 33 C.F.R. Part 161, Subpart B (1974).<sup>33</sup> That system does not involve comprehensive control of tanker movement but simply establishes separated lanes, partial radar tracking, and periodic reporting requirements.

The Vessel Traffic System is unaffected by the use of tug escorts or by the absence of supertankers greater than 125,000 DWT from Puget Sound. There is no evidence in the record which even remotely suggests, and the District Court did not find, that Chapter 125 has any effect on the operation of the Puget Sound Vessel Traffic System.

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<sup>32</sup>It is clear there must be a concrete, specific conflict before a statute can be struck down. As the Seventh Circuit Court of Appeals stated in *Proctor & Gamble Co. v. Chicago*, 509 F.2d 69, 77 (7th Cir.), cert. denied, 421 U.S. 978 (1975), "[I]n a case involving environmental legislation it is actual conflict not potential conflict that is relevant." See also *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973); *Goldstein v. California*, 412 U.S. 546, 554-55 (1973). "[T]he teaching of this Court's decisions \* \* \* enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960).

<sup>33</sup>Although certain amendments to this system have been proposed, see 42 Fed. Reg. 3182 (January 17, 1977), they are not material to the instant litigation.

Since Chapter 125 does not impose any design, construction or equipment standards, no conflict is even possible. Even assuming the Coast Guard had rejected double-bottoms, twin screws, collision avoidance radar and shaft horsepower requirements as mandatory, their inclusion as an alternative to tug escorts under the State regulatory scheme poses no conflict. Further, it is beyond dispute that any oil tanker between 40,000 DWT and 125,000 DWT which has the design and equipment features embodied in Section 3(2) of Chapter 125 (Wash. Rev. Code § 88.16.190(2)) can also comply with all rules and regulations promulgated under the PWSA for vessels in both domestic and foreign trade.<sup>34</sup>

#### B. Congress In The Ports And Waterways Safety Act Did Not "Unmistakably Ordain" That Federal Law Is Exclusive.

In order to explicitly preempt the historic police power of the state, Congress must expressly and unequivocally declare that federal authority is exclusive. See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The PWSA does not declare federal exclusivity and the

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<sup>34</sup>See 33 C.F.R. Part 151 (1975) (general rules for tankers in domestic trade); 33 C.F.R. Part 157 (1976) (general rules for tankers in domestic trade); 33 C.F.R. Part 157, as amended by 41 Fed. Reg. 54177 (December 13, 1976) (general rules for tankers in foreign trade); 33 C.F.R. Part 164, adopted at 42 Fed. Reg. 5955 (January 31, 1977) (navigational safety rules).

District Court found no express preemption of Chapter 125.<sup>35</sup>

**1. The language and the structure of the Ports and Waterways Safety Act demonstrate that no preemption is intended.**

Neither the language nor the structure of Title I of the PWSA lends itself to a finding that Congress has acted to exclude all state tanker regulation. Title I does not deal with the entire field of tanker regulation. It is legislation which grants *discretionary* authority to the Coast Guard, but which does not mandate any regulatory measures. Moreover, Title I is directed primarily toward establishing vessel traffic systems or services to ensure port safety. Section 101(1). *See generally* H. R. Rep. No. 92-563, 92nd Cong., 1st Sess. (1971) ("PWSA House Report"); PWSA Senate Report.<sup>36</sup> Title I does not provide the Coast Guard with authority to establish design and construction standards for vessels, and indeed, contains no provision which even relates to equipment requirements for vessels outside of the limited context of equipment needed to utilize vessel traffic services or systems. Section 101(2).

A reading of the PWSA indicates Congress did not consider this legislation to be preemptive, but rather to be additional authority to be carefully placed beside existing federal, state and local regula-

<sup>35</sup>ARCO did not claim that any federal legislation, other than the PWSA, explicitly preempts the matters regulated by Chapter 125.

<sup>36</sup>The establishment of vessel traffic systems is "the heart of the legislation." PWSA House Report at 8.

tions over the same subject. At least two sections of the PWSA not only recognize state police power authority over vessels but also contemplate continuation of state and local regulation of vessels and related matters after passage of the PWSA:

*In determining the need for, and the substance of, any rule or regulation or the exercise of other authority hereunder the Secretary shall, among other things, consider—*

- \* \* \*
  - (6) *Existing vessel traffic control systems, services, and schemes; and*
  - (7) *local practices and customs,* \* \* \*
- Section 102(e), (emphasis supplied).

The statute further provides:

*In the exercise of his authority under this title \* \* \* [t]he Secretary may also consider, utilize, and incorporate regulations or similar directory materials issued by port or other State and local authorities. Section 102(c).<sup>37</sup>*

The only language in the entire PWSA which could arguably indicate an intent by Congress to preempt some aspect of state authority is contained in Section 102(b), which provides:

*Nothing contained in this title [Title I] supplants or modifies any treaty or Federal statute or authority granted thereunder, nor does it prevent a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety stand-*

<sup>37</sup>Section 101(5) also recognizes and preserves continued state authority. The Coast Guard may require pilots "where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved."

ards than those which may be prescribed pursuant to this title. Section 102(b).

No prohibition of any state action is expressly stated. Rather, this section is phrased as a preservation of state authority over onshore structures.<sup>38</sup> Any negative inference of Section 102(b) regarding state authority is so ambiguous and obscure as to be insufficient, as the District Court implicitly recognized, to demonstrate the requisite congressional preemptive intent.<sup>39</sup>

Section 102(b) applies only to Title I of the PWSA, which is directed primarily at Coast Guard authority to establish vessel traffic systems. Moreover, by its terms, Section 102(b) refers to "safety equipment" or "safety standards". The vessel "equip-

<sup>38</sup>The language in Section 102(b) was in part a response to a considerable number of witnesses before the House Committee who were fearful that the Coast Guard would extend its "safety equipment requirements for structures" in Section 101(7) of the PWSA to structures only remotely related to the water and create an onshore permit program as extensive as the Army Corps' navigation permit program. *Hearings on H.R. 867, H.R. 3635, H.R. 8140 and H.R. 6332, before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. 141, ser. 91-12 (1971). ("PWSA House Hearings").

<sup>39</sup>Congress, it must be emphasized, knows well how to explicitly preempt state legislation. Thus, for example, in the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857 et seq., Congress expressly preempted the field of adopting and enforcing new car emission standards to prevent air pollution in the following language:

**§ 1857f-6a State Standards**

(a) No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as a condition precedent to the initial retail sale, titling (if any) or registration \*

ment" which the Coast Guard is authorized to require under Title I consists of "electronic or other devices necessary for the use of the [vessel traffic] service or system."<sup>40</sup> Section 101(2). Thus, one cannot properly conclude that Congress intended the language "safety equipment" and "safety standards" in Section 102(b) to embrace Washington's access limit, tug escort or alternative design provisions.

However, even if the broadest interpretation is taken of any negative preemptive implications of Section 102(b) upon state power, Chapter 125 is still valid. Section 102(b) specifically deals with situations in which a state may *prescribe higher standards* than those established by the Coast Guard. In this case the Coast Guard has established a vessel traffic system for Puget Sound. The requirements of Chapter 125 are unrelated to that system; thus they cannot be construed as "higher standards" which would be preempted.

Title II of the PWSA, for its part, authorizes the Coast Guard to promulgate "minimum standards" for the "design, construction, alteration, repair, maintenance and operation" of tankers in order to protect the marine environment. Title II contains

<sup>40</sup>Equipment required in the Puget Sound Vessel Traffic System is limited to "a radio telephone that is capable of operation on the navigational bridge of the vessel," 33 C.F.R. § 161.122 (1974). In addition, the Coast Guard requires all vessels over 1,600 DWT operating in navigable waters to be equipped with a radar system, a steering compass, a gyrocompass, a rudder angle indicator, and an echo depth sounding device. 33 C.F.R. Part 164, adopted at 42 Fed. Reg. 5955 (January 31, 1977). None of these equipment requirements are affected by the presence or absence of tug escorts.

no language whatsoever with respect to preemption of state standards. In fact, if anything, the language and structure of Title II contain the inference that state standard setting is permissible. If federal standards are "minimum," there would appear to be nothing to prevent other governmental bodies, such as state legislatures, from establishing standards more stringent than the minimum.<sup>41</sup>

## 2. The legislative history of the Ports and Waterways Safety Act reveals no intent to preempt.

The legislative history of both Title I and II of the PWSA equally fails to reveal an intent to preempt all state regulation of oil pollution hazards.

The genesis of Title I indicates concurrent federal and state regulation was contemplated.<sup>42</sup> Prior to 1972, the Coast Guard's authority to regulate port safety was fragmented. It acted under three separate

<sup>41</sup>The use of "minimum" language in a statute is indeed strong evidence that Congress did not intend to displace state regulation. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147-148 (1963); cf., *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), aff'd, 440 F.2d 1319 (2nd Cir.), cert. denied, 404 U.S. 983 (1971); *A. E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 264 N.E.2d 118 (1970), appeal dismissed sub nom. *Reptile Products Association, Inc. v. Diamond*, 401 U.S. 969 (1971) (state statute regulating importation of endangered species upheld when state endangered species list more comprehensive than that established under federal endangered species legislation).

<sup>42</sup>Secretary of Transportation John Volpe, in transmitting to Congress the Administration's bill in a form almost identical to the enacted Title I of the PWSA, stated:

[W]e would expect to continue to encourage greater involvement and allocation of resources by state and local port authorities. Though the regulatory authority of our proposal will assure appropriate federal coordination and general uniformity, the scope of the port safety task as well as unique local conditions and problems virtually compels local as well as federal effort. PWSA House Hearings at 4. (emphasis supplied).

grants of authority: the Tank Vessel Act of 1936, ch. 729, 49 Stat. 1889, which gave it authority to issue regulations with respect to vessels carrying "inflammable or combustible cargoes"; the Magnuson Act, 50 U.S.C. § 191 (1970) which authorized the promulgation of rules governing the movement, inspection, and guarding of vessels, harbors, ports and waterfront facilities in the United States upon a determination that our national security was in danger; and the Dangerous Cargo Act, ch. 777 § 1, 54 Stat. 1023 (1940), which provided authority to issue regulations governing the carriage of explosives or dangerous substances, including oil. Significantly, the first two statutes were wholly silent as to preemption, while the third contained a specific waiver of preemption.<sup>43</sup> It thus can scarcely be said that prior to 1972 regulation of the movement of oil in our ports and waterways was recognized by Congress as an exclusively federal function.

The purpose of Title I was simply to place Coast Guard regulation on a more permanent and broader statutory footing, confirming existing Coast Guard authority and extending it to permit the establishment of vessel traffic control systems made possible by newly developed technology. PWSA House Report at 3, 7; PWSA Senate Report at 2791-92. The mere

<sup>43</sup>Section 7(d) of the Dangerous Cargo Act, ch. 777, 54 Stat. 1023 (1940), provided:

Nothing contained in this section shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted, which are not inconsistent or in conflict with this section or the regulations of the Commandant of the Coast Guard established hereunder.

enactment of Title I cannot lead to the conclusion that preemption was intended where it never had existed before. Furthermore, prior to the passage of PWSA, at least ten vessel traffic systems were in operation in various ports and harbors.<sup>44</sup> Several of these were specifically brought to the attention of Congress, including those in Chesapeake Bay, the Delaware River, Los Angeles-Long Beach Harbor, Honolulu and the Saint Mary's River.<sup>45</sup> As recognized by this Court in *New York Department of Social Services v. Dublino*, 413 U.S. 405, 414 (1973), congressional awareness of such systems, coupled with the absence of direct and unambiguous preemptive language, is a very strong indication that Congress did not intend to preempt and thereby abolish existing state and local regulation.<sup>46</sup>

While the legislative history of Title I reflects some concern about the regulation of vessels by state and local authorities, this concern was directed primarily at situations where *conflict* might arise between state and federal legislation, *see, e.g.*, State-

<sup>44</sup>*Hearings on Vessel Traffic Control before Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 183, ser. 94-39 (1975).

<sup>45</sup>PWSA House Hearings at 26, 317-18. Hearings on the Navigable Waters Safety and Environmental Quality Act before the Senate Committee on Commerce, 92d Cong., 1st Sess. 137-138. ser. 92-39 (1971). ("PWSA Senate Hearings").

<sup>46</sup>In *Dublino*, the Court, rejecting a claim of preemption, noted that 21 states had welfare work requirements in existence when the Federal Work Incentive Program legislation was enacted:

*If Congress had intended to preempt state plans and efforts in such an important dimension of the AFDC program as employment referrals for those on assistance, such intentions would in all likelihood have been expressed in direct and unambiguous language. No such expression exists, however \* \* \* \* (emphasis supplied).*

ment of James Reynolds, President, American Institute of Merchant Shipping, in *Hearings on H.R. 17830, H.R. 18047, H.R. 15710, Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. 181-182, ser. 91-34 (1970), particularly regarding equipment regulations and safety standards which relate directly to implementation of vessel traffic systems. *See, e.g.*, Testimony of John Reed, Chairman of the National Transportation Safety Board, *PWSA House Hearings* at 348-49 (1971); *see also* Statement of Clayton Peavey, Chief, Central Planning Division, Port of New York Authority, *id.* at 185-86.

Although the House Report's discussion of Section 102(b) at one point states that "state regulation of vessels is not contemplated," the remainder of the Report's discussion of Section 102(b), set in the context of other legislative history, indicates that a narrower reading of Section 102(b) is appropriate. Any preemption, at best, is limited to equipment or standards which may conflict with or are deemed necessary to utilize a vessel traffic system.<sup>47</sup>

<sup>47</sup>The full discussion of Section 102(b) in the House Report is as follows:

This amendment was suggested since it was felt that H.R. 8140 [the bill which became the PWSA] does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. The inserted language is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated.

Last year in the hearings on H.R. 17830, Subcommittee Counsel asked the Coast Guard [Chief] Counsel whether it was the intention of the Coast Guard that states should prescribe safety equipment standards for vessels. The Coast Guard witness said that it was their intention that higher vessel equipment regulations and standards by States should apply to structures only and not to

The legislative history of Title II of the PWSA is almost wholly silent on the question of preemption. In fact, the issue of preemption was not focused upon during the course of the Senate Commerce Committee's hearings. *See Hearings on S.2074 Before the Senate Commerce Committee*, 92d Cong., 1st Sess., ser. 92-39 (1971). It is not mentioned in the Senate Report on the PWSA, and it was not alluded to during either Senate or House consideration of the legislation on the floor. *See* 118 Cong. Rec. 11058-60, 22983-86 (1972).

In sum, neither the language nor the history of the PWSA will support a conclusion that Congress clearly and manifestly intended to preempt the field of regulation of oil tanker pollution. Appellants suggest that the reaction of Senator Warren Magnuson, the Senate sponsor of the PWSA, to the decision of the District Court is precisely in point:

As the sponsor of that Act [the PWSA] in the Senate, I have made known my disagreement with the decision. I think it is wrong; I feel the Court has simply misread the intent of Congress as contained in the Ports and Waterways Safety Act. The weakness of the decision is highlighted by the complete absence of any analysis of the terms of the Act. The Court's reasoning was simplistic at best. Preemption is not favored in the law. Congress must show a clear intent to

vessels. He agreed that the language of H.R. 17830 was not clear in this regard and that we should put some clarifying language in the section.

Your committee adopted the suggested language since it will make clear the intent mentioned above. PWSA House Report at 15. The Senate Report, for its part, discussing the section which became 102(b), contains no reference to preemption. PWSA Senate Report at 2793.

preempt before such a finding is made. This court summarily reached its decision on the thinnest of reasoning. I say they are wrong. 121 Cong. Rec. 17575 (daily ed., October 1, 1976).<sup>48</sup>

#### C. There Is No Implicit Preemption Of Chapter 125.

The District Court, rather than finding conflict or express preemption, in essence held Chapter 125 unconstitutional on the basis of implicit preemption. Such a holding was unsupported by authority and is unsupportable based upon the factors generally considered in an implicit preemption analysis.<sup>49</sup>

##### 1. The regulatory scheme established by the Ports and Waterways Safety Act is not so extensive as to preclude state action.

The District Court found preemption in part based on its conclusion that the PWSA established a "comprehensive federal scheme" for regulating oil

<sup>48</sup>Senator Magnuson expressed similar views when he submitted a statement to a joint session of the Washington State House and Senate Energy and Transportation Committees, in November, 1975, where he stated:

I wish I could report that the Ports and Waterways Safety Act has been an unqualified success. It has not. It has only been a limited success, because the power to regulate vessel operations and tanker construction standards has simply not been used by the Coast Guard as we in Congress expected—and as we were promised. The Coast Guard has done an excellent job with the vessel traffic control system established by that Act, and particularly here in Puget Sound. It has not, however, gone beyond that system to require the controls needed.

*Fortunately, that federal law does not prevent you from enacting regulations over vessel operations here at the state level.* (emphasis supplied.)

<sup>49</sup>The District Court cited no authority for its analytical approach. However, the factors relied upon by other courts to find implicit preemption are: (1) whether the federal scheme is so pervasive that there is no room for state action, (2) whether there is a dominant federal interest in uniform federal regulation so as to preclude enforcement of state laws, and (3) whether the state policies produce a result inconsistent with the objectives of federal legislation. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

tankers. (Juris. St., App. C, p. 7a.) However, the extent of the federal scheme established by the PWSA is not sufficient grounds for finding Chapter 125 preempted.<sup>50</sup> The Court has often emphasized that comprehensive statutory schemes, enacted in the exercise of what may be broad federal powers, may nonetheless leave the states with extensive leeway to achieve complementary goals under state legislation. See, e.g., *DeCanas v. Bica*, 424 U.S. 351 (1976); *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973). Detailed statutory schemes are necessarily appropriate, quite apart from pre-emptive intent, in most areas of modern life. As the Court stated in *Dublino*, 413 U.S. at 415:

<sup>50</sup>While ARCO argued below that, quite apart from the PWSA, there was a "maze of federal legislation", a "seamless web" which left no room for state action, the patent speciousness of such an argument is borne out by the numerous cases which have upheld state regulation of vessels in the face of claims of federal preemption. Thus, in *Kelly v. Washington*, 302 U.S. 1 (1937), the Court upheld the State's inspection and regulation of tugboats which were either registered, or enrolled and licensed under federal laws. In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), the Court upheld Detroit's Smoke Abatement Code, which required structural alterations in vessels, even though those ships met all federal design and equipment requirements. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court upheld the Florida Oil Spill Prevention and Pollution Control Act, which provided for the State's recovery of clean-up costs and imposed strict, no fault liability on vessels entering state waters, even though the Federal Water Quality Management Act established "a pervasive system of federal control over discharges of oil." 411 U.S. at 330. See also *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me.), appeal dismissed, 414 U.S. 1035 (1973). Each of these cases rests, to some extent, on its own special facts, but each serves to demonstrate the extent to which there is room under the overall federal scheme of oil tanker regulation for local pollution control efforts. See also discussion at 25-26, *supra*, of extensive state police power regulation of vessels.

We reject, to begin with, the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions. The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. Given the complexity of the matter addressed by Congress in WIN, a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent. (citations omitted).<sup>51</sup>

The inquiry is whether Congress, having failed to expressly preempt, has created a scheme which leaves no room for state action.

The PWSA is not so comprehensive, in intent or implementation, as to oust the states from a regulatory role in the marine pollution area.<sup>52</sup> Title I does

<sup>51</sup>In the District Court, ARCO relied on two decisions, *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972), for the proposition that a comprehensive federal regulatory scheme must necessarily preclude complementary state regulation. However, both cases are limited to rather special circumstances: radiation standards in *Northern States* and air space management in *Burbank*, where there was a history of exclusive federal control and no history of state police power regulation. As such, they have little application to an area such as port and waterway safety, where a state has long been held to have "exceptional scope for the exercise of its regulatory power . . . ." *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 783 (1945).

<sup>52</sup>In determining whether the federal scheme is so pervasive as to leave no room for state laws, the Court examines what in fact has been federally regulated. As repeated in *DeCanas v. Bica*, 424 U.S. 351, 360 at n.8 (1976):

Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation. *Every Act of Congress occupies*

not contemplate that vessel traffic systems or services will necessarily include all aspects of navigational safety within a particular port or harbor area, nor does it require such systems for all ports. Since Congress contemplated there may be widespread variations from port to port in the specifics of tanker regulation, any comprehensiveness of the federal program is of little relevance. Cf., *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 8 (1943); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 148-49 (1963). The Coast Guard recently agreed that Title I left room for supplemental state regulation, specifically stating that states could require tug escorts to address particular local risks.<sup>53</sup>

The PWSA was the result of a deliberate effort by Congress to carefully define the scope of the Coast Guard's authority, including the types of waters in which it could establish vessel traffic systems, the elements of such a system, and the manner in which direct vessel movement would be controlled. In explaining Title I, and how it had been modified in response to extensive criticism of a prior port safety bill, Coast Guard Admiral Bender characterized the language of the PWSA as:

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*some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution \* \* \* \* Hines v. Davidowitz*, 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting) (emphasis supplied.)

<sup>53</sup>Coast Guard Response to Questions asked of Admiral Siler by Senator Magnuson, *Hearings on Recent Tanker Accidents, before the Senate Commerce Committee*, 95th Cong., 1st Sess. 412, 463, ser. 95-4 (1977). A more complete discussion of the Coast Guard response is contained at 62-63, *infra*.

[C]arefully limiting the scope of the authority granted and more precisely defining the activities and regulations so authorized. *PWSA House Hearings* at 21.<sup>54</sup>

The primary regulatory objective of Title I was the authorization of the Coast Guard to establish vessel traffic systems in "waters subject to congested vessel traffic" and to require the "installation of electronic or other devices necessary" to use that system. Sections 101 (1 and 2). While other regulatory measures were authorized, see, e.g., Sections 101(3), (4) and (5), it was understood that any direct control of vessel movement by the Coast Guard would be done only in limited circumstances:

Mr. Clark. *To what degree and under what circumstances would the Coast Guard employ firm control of traffic?*

Admiral Bender. There are many degrees of control that might be employed, Mr. Chairman. *First would be the simple matter of regulation*, such as for example, *establishing one-way channels, or the speed in the channel, but as for the direct control of traffic*, while it is engaged in its movement we would generally rely upon advice, and *only issue direct orders to the master or to the pilot under circumstances of extreme emergency.* \* \* \*

*We do not see the extent of traffic control that the Federal Aviation Administration requires*

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<sup>54</sup>In 1970, the Administration introduced in Congress H.R. 17830, which would have provided very broad authority to prescribe marine traffic control procedures. In 10 days of hearings, the bill was heavily criticized as "loosely drawn and \* \* \* both vague and exceedingly broad in its scope." *PWSA House Report* at 4; *PWSA House Hearings* at 1. The bill was not enacted. See also comparison of changes between H.R. 17830 and H.R. 8140. *PWSA House Hearings* at 27-28.

*either on airways or at the airport.* PWSA House Report at 8-9. (emphasis supplied.)

Thus, Title I does not contemplate that a vessel traffic system, even if established for a port, will necessarily include all aspects of vessel regulation. What in practice are the operative provisions of Chapter 125, i.e., tug escorts and the access limit, are barely addressed in the PWSA, let alone in a comprehensive manner. For example, the legislative history of the PWSA contains no discussion of tug escorts. To the extent the PWSA authorizes the Coast Guard to consider tugs or access limits, that authority is contained in Sections 101(3)(iii) and (iv), which refer respectively to "establishing vessel size and speed limitations and vessel operating conditions" and "restricting vessel operation." These Coast Guard powers, however, relate primarily to the operation of vessel traffic control systems.<sup>55</sup> Moreover, they may be limited by the preambular language of 101(3) to areas which are "especially hazardous" or to temporary hazardous conditions, such as those which might be caused by adverse weather or reduced visibility.

The District Court apparently concluded mere enactment of the PWSA preempted state authority.<sup>56</sup> As discussed at pages 33-34, *supra*, such a view ignores the statutory language recognizing existing state and local traffic systems. *See, e.g.*, Sections

<sup>55</sup>PWSA Senate Report at 2791-92.

<sup>56</sup>The District Court concluded that since the PWSA granted the Coast Guard the authority to require tugs and exclude tankers, these provisions in Chapter 125 were thereby preempted. (Juris. Stat., App. C, pp. 7a-8a.)

102(c) and (e). Furthermore, the District Court's conclusion that the "comprehensive federal scheme" preempted "the field" (Juris. Stat., App. C, p. 7a) overlooks the fact that Title I does not require the Coast Guard to take any action in any port. Section 101 provides the Coast Guard *may* establish vessel traffic systems. Given the clear congressional objective of protecting marine environments from vessel pollution, it is unlikely Congress intended enactment of the PWSA to preclude states from protecting their waters, even "congested" or "hazardous" areas, while leaving it to the Coast Guard in its discretion to decide, for whatever reasons, whether or not to exercise the powers granted it.<sup>57</sup>

The implementation of Title I also leaves room for state regulatory activity. In the case of Puget Sound, although the Coast Guard Vessel Traffic System establishes a general routing and reporting system, that system is scarcely all-encompassing. For example, while its traffic lanes keep vessels separated, the system does not purport to address other problems of tanker movement, such as lack of maneuverability and loss of power—problems addressed by Chapter 125.<sup>58</sup>

<sup>57</sup>In determining preemptive intent, the Court may consider the distinction between a duty imposed and an action permitted. *See, e.g.*, *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79, 84-85 (1939):

In view of the effort of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. *See also Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 765-66 (1945).

<sup>58</sup>While the Coast Guard has published an Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976), indicating

The Coast Guard has neither proposed nor adopted regulations establishing general access limits for Puget Sound. Indeed, the subjects of tug escort requirements and access limits were never considered by the Coast Guard when it established the Puget Sound VTS. *See generally* Notice of Proposed Rulemaking, Puget Sound Vessel Traffic System, 38 Fed. Reg. 21227 (August 6, 1973); Final Rules and Regulations for Vessel Traffic Systems in Puget Sound, 33 C.F.R. Part 161 (1974). Not a single person who testified on or submitted comments with regard to the proposed Vessel Traffic System rules suggested that tug escort or vessel access limits be established—they were simply outside the scope of the rulemaking. *See generally* Public Docket, CGD 73-158 PH, Coast Guard Headquarters, Washington, D.C. 20590.

It is equally clear that the design and construction standards authorized and adopted under Title II are not comprehensive in the sense of precluding all state efforts to protect their waters.<sup>59</sup> Certainly,

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that it is considering the possibility of proposing general regulations for tug escorts, it has not actually proposed, let alone adopted, such regulations.

<sup>59</sup>The regulations adopted to date by the Coast Guard under the PWSA, and the new tanker safety initiatives announced by President Carter on March 18, 1977, leave room for state action. Regulations currently in effect under Title II of the PWSA have been recognized by the Coast Guard itself as "not a complete and comprehensive answer" to the tanker pollution problem. United States Coast Guard, *Final Environmental Impact Statement on Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade* at 1 (August 15, 1975) ("CG EIS," Ex. X., A. 207). They have, moreover, primarily been directed at the reduction of operational pollution, CG EIS at 1, 2, 6, 6a, 60e, 60f (A. 212-213, 219-220, 286) whereas the

there is nothing in the PWSA, no matter how comprehensive its intent, which would make it inappropriate for a state to specify optional design and equipment features, which features are deemed equivalent to tug escorts in providing protection to a unique marine environment. Yet this is all that Chapter 125 does.

In sum, the field is left open for state action to supplement federal requirements in order to protect local marine environments and the jobs and industries dependent on their natural resources. Cf., *Parker v. Brown*, 317 U.S. 341 (1943); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939).<sup>60</sup>

## 2. **Tanker regulation does not require uniform national implementation.**

To the extent the District Court found preemption based on a need for uniformity, the Court was speaking primarily of vessel design and con-

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thrust of Chapter 125 is to reduce accidental pollution risks. The Presidential initiatives would go substantially beyond existing Coast Guard requirements in establishing new design, equipment, construction and manning requirements. Statement of Brock Adams at *Hearings on S.182 et al. before the Senate Committee on Commerce, Science and Transportation*, 95th Cong., 1st Sess. (March 18, 1977) ("Adams Statement"). However, there is much that they leave untouched. The Presidential initiatives contain nothing with respect to access limits on traffic in sensitive or hazardous environments, the need for tug assistance, or the use of pilots, all integral elements of Chapter 125.

<sup>60</sup>To the extent that a case such as *Napier v. Atlantic Coast R.R. Line*, 272 U.S. 605 (1926), stands for any different proposition, it simply no longer represents the law. Its basic holding that unimplemented federal power is still preemptive has been completely eroded. See, e.g., *Terminal R.R. Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). Napier's emphasis on the scope of federal regulation alone as the dispositive criterion in preemption cases cannot be squared with later cases. E.g., *Florida Lime & Avocado Growers, Inc.*, *supra*.

struction standards which the Coast Guard promulgates under Title II of the PWSA. However, the protection of marine environments, such as Puget Sound, from the risks of oil tanker pollution does not inherently require exclusive national supervision.<sup>61</sup>

The District Court's conclusion that Title II mandates uniform design and equipment standards is incorrect for several reasons. First, the language of Title II itself, calling for "minimum standards" by the Coast Guard, negates any conclusion the PWSA requires exclusive national control to achieve uniformity. Second, the District Court ignored the fact that tankers on Puget Sound have complied with Chapter 125 since its effective date without any design or equipment modifications, and failed to discuss how Washington's optional design features, as *alternatives* to tug escorts, can interfere with any purported need for uniformity of design and equipment standards. Third, design and equipment standards may vary as a function of local conditions. Consistent with the "systems approach" mandated by Title II of the PWSA, PWSA Senate Report at 2773, the Coast Guard acknowledges that particular design and construction features may depend upon such factors as the environment and the geographic location in which a ship is operating. For example, with respect to maneuverability features such as twin

<sup>61</sup>Far from requiring uniform regulation, protection of local waters demands diverse responses. See generally cases cited at p. 26, fn. 30, *supra*.

screws, the Coast Guard has stressed that the effectiveness of such features in improving tanker "controllability" may depend upon "the environment in which the specific ship is operating" and "the constraints imposed by the geographic location within which the ship is operating." *CG EIS* at 64. (A. 293.) In other words, in certain environments, specified maneuverability features may make substantial sense, even if not mandated on a national basis.

Tug escorts and access limits, as with design and equipment standards, do not require national uniformity. The PWSA, as well as Coast Guard implementation thereof, recognize that a diversity of local conditions may call for a diversity of appropriate solutions. Title I of the PWSA is specifically adapted to the promulgation of different regulations for each port. Thus, Section 102(e) provides:

*In determining the need for, and the substance of, any rule or regulation or the exercise of other authority hereunder, the Secretary shall, among other things, consider \* \* \**

- (1) *the scope and degree of hazards;*
- (2) *vessel traffic characteristics \* \* \*;*
- (3) *port and waterway configurations and the differences in geographic, climatic, and other conditions and circumstances;*
- (4) *environmental factors;*
- (5) *economic impacts and effects;*
- (6) *existing vessel traffic control systems, services and schemes; and*
- (7) *local practices and customs \* \* \* (emphasis supplied).*

Both the Senate and House Reports on the PWSA emphasize the port by port approach mandated by

the Act, taking into account varying local environmental hazards. PWSA Senate Report at 2791-92; PWSA House Report at 8.

Chapter 125 responds to local conditions. Tug escorts supplement maneuverability of oil tankers between 40,000 and 125,000 DWT, in response to natural conditions in Puget Sound such as the depth and width of channels, location of islands and other navigational hazards, tidal currents, prevailing fog and visibility conditions and prevailing winds.

(A. 69.)

The access limit on oil tankers greater than 125,000 DWT also responds to natural conditions. Five of the six refineries adjacent to Puget Sound cannot handle a tanker as large as 125,000 DWT. Each has a controlling dockside depth of 45' or less, and a 120,000 DWT tanker has a 52' draft. Although ARCO can receive tankers greater than 125,000 DWT, ARCO is also restricted by a dockside depth of approximately 55'.<sup>62</sup> Further, along the tanker's route through the San Juan Islands, the depth in places is only 60 feet. (A. 65.)

The absence of a need for exclusive federal control over access limits is demonstrated by the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*, which establishes a federal scheme for the licensing of offshore terminals for supertankers beyond the existing territorial jurisdiction of the states. The

<sup>62</sup>The largest tanker to call at ARCO's refinery was 138,000 DWT. (A. 113.)

Act specifically vests in adjacent states an absolute veto over port proposals, 33 U.S.C. §§ 1503(c)(9) and 1508(b), thereby reflecting a congressional judgment that individual states should have final authority over supertanker use off their coasts.<sup>63</sup> It is highly unlikely that Congress intended that the State of Washington could exclude supertankers at offshore ports but not do so in inland waters where the dangers of transportation are greater, as are the environmental values to be preserved.

Thus, given the wide variance in local environmental needs and sensitivities, there is no inherent reason to have exclusive federal control and thus no grounds to infer preemption. Where, as here, the congressional objective of reducing the risk of economic and environmental damage caused by oil spills

<sup>63</sup>Contrary to the suggestion of ARCO below, states were given this authority to protect the marine environment from oil spills, as well as to control landside impacts. The congressional judgment is well expressed in the Senate Report on the Act, which states:

The Committees believe that such provisions [the state veto provision] are necessary to protect the interests of coastal states in the deepwater port development process. States and localities will ultimately experience economic and environmental impacts as a result of deepwater port development.

\* \* \*

The Committees believe that any coastal State which chooses to forego benefits associated with deepwater ports to avoid potentially adverse environmental impacts should be allowed to veto the issuance of a license for deepwater port development off its shores. The Deepwater Port Act of 1974 creates this explicit veto power in section 4(c)(9) and section 9(b) because a state would not otherwise have such authority over a Federal license. *Joint Report on S.4076 of the Senate Committees on Commerce, Interior and Insular Affairs and Public Works, S. Rep. No. 93-1217, 93rd Cong., 2d Sess. 10.* (October 2, 1974). (emphasis added).

State power has in fact been recognized in implementation of the Act as extending to the design, construction, equipment and operation of supertankers. See stipulation of settlement and voluntary dismissal dated January 14, 1977, in *Askew v. Coleman*, civil action No. 76-2005 (D.D.C., filed October 28, 1976).

is furthered by the exercise of traditional state police powers supplementing federal programs operating in related but distinct areas, a preemptive intent cannot be reasonably found.<sup>64</sup>

**3. Chapter 125 is consistent with the Ports and Waterways Safety Act and overall federal policy for protection of the marine and coastal environment.**

The District Court characterized the PWSA as not "inviting" state participation in its regulatory scheme (Juris. Stat., App. C, pp. 9a-10a.), and ARCO argued below that any state regulation would interfere with the balance which must be struck by the Coast Guard in implementing the PWSA. However, an examination of (a) the goals of Chapter 125 and the PWSA, (b) the effect of implementation of Chapter 125 on the accomplishment, both nationally and internationally, of the goals of the PWSA, and (c) the necessity of interpreting the PWSA consistently with overall federal policy for protection of the marine and coastal environment, serves to demonstrate that Chapter 125 is fully compatible with, and indeed helps achieve, the objectives of the federal legislation.

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<sup>64</sup>This judgment has been well expressed by Chief Judge Lumbard of the Second Circuit in *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2d Cir. 1969):

We have already stated that the express purpose of the federal statute before us is the reduction of traffic accidents. Uniformity through national standards is of course desirable, but in these cases it is truly a secondary objective. \* \* \* \* If traffic safety is furthered by a traditional type of state regulation under the police power, as we feel that it is here, a narrow construction of the preemptive effect of the federal Act and Standard No. 108 is required.

**a. The goals of state and federal laws are consistent.**

The full purpose and objectives of the PWSA are to prevent maritime damage and "to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction or loss." Section 101.<sup>65</sup> Chapter 125 seeks to achieve like goals. Its essential purpose is "to decrease the likelihood of oil spills on Puget Sound and its shorelines." Chapter 125, Section 1 (Wash. Rev. Code § 88.16.170).

Obviously, there is "overlap," as the District Court indicated (Juris. Stat., App. C, pp. 10a-11a.), between the purposes of Chapter 125 and those of the PWSA. Such overlap, however, is emphatically not grounds for inferring a preemptive intent and upsetting state police power regulation. The Court has consistently upheld state laws where their purposes have been parallel to, complementary with, or in furtherance of the goals of the federal act by which it is claimed they are preempted. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Goldstein v. California*, 412 U.S. 546 (1973); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

As the Court stated in *New York State Depart-*

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<sup>65</sup>In addition to the general goals of the PWSA enunciated in Title I, Title II is intended to achieve the improvement of "existing standards for the design, construction, alteration, repair, maintenance and operation of [certain bulk cargo vessels, including oil tankers] for the adequate protection of the marine environment." Section 201(1).

*ment of Social Services v. Dublino*, 413 U.S. 405, 419 (1973):

It would be incongruous for Congress on the one hand to promote [a given goal] \* \* \* and on the other to prevent States from undertaking supplementary efforts toward this very same end.

b. **Chapter 125 does not impede the enforcement or accomplishment of the objectives of the Ports and Waterways Safety Act.**

Not only are the purposes of Chapter 125 and the PWSA consistent, but it is also clear that, contrary to the claims of ARCO below, Chapter 125 does not upset any delicate "balancing of competing interests" which must be made under the PWSA before regulations are issued, nor does it interfere with any goal of encouraging international agreement.

ARCO below sought to analogize the decision-making process under the PWSA to that created by the Federal Aviation Act, 49 U.S.C. §§ 1301, *et seq.*, and the Atomic Energy Act, 42 U.S.C. §§ 2051, *et seq.*, federal regulatory schemes in which it was held in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972), that a federal balancing of competing factors excluded state regulation. The statutory scheme at issue here is significantly different. Whereas the Administrator of the Federal Aviation Administration and the Commissioners of the

Atomic Energy Commission were charged with the dual functions of both regulating *and* promoting an industry, thereby making balancing of commercial and safety factors the essence of the decision-making process, the Secretary of Transportation is charged under the PWSA solely with regulatory functions. A fundamental purpose of the PWSA is to provide for environmental protection. Economic and commercial considerations, although relevant, *see* Sections 102 (e) (5), 201(4), are incidental to the accomplishment of the basic purposes of the statute. *See, e.g.*, PWSA Senate Report at 2777. The requirements of Chapter 125 cannot be interpreted as "interfering" with any "delicate balance" established under the PWSA. Rather, with a parallel goal of environmental protection, its implementation helps to fulfill the PWSA's general objectives.

It is equally clear that the specific provisions of Chapter 125 do not upset the administration of the PWSA. In the District Court, ARCO did not seriously contend that tug escorts impeded the accomplishment of PWSA purposes. The exclusion of supertankers from Puget Sound is consistent with the intent of Congress that vessel size limitations not be imposed universally, but only be established on a port by port basis, based on a consideration of local needs. PWSA Senate Report at 2792. Indeed, this is precisely what the State of Washington has done.<sup>22</sup>

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<sup>22</sup>The findings of Chapter 125 are explicit in this regard:  
The legislature further recognizes that certain areas of Puget Sound and adjacent waters have limited space for maneuvering a

Furthermore, this action is fully compatible with and indeed contemplated by the state veto over supertanker use embodied in the Deepwater Port Act of 1974, 33 U.S.C. §§ 1503(c)(9), 1508(b). Indeed it is in furtherance of the environmental purpose of the Deepwater Port Act that, because of the risk of major spills, supertankers should be utilized at *offshore* ports, away from sensitive areas such as Puget Sound.<sup>66</sup> Joint Report of the Senate Committee on Commerce, Interior and Insular Affairs and Public Works on S.4076, S. Rep. No. 93-1217, 93rd Cong., 2d Sess. 101 (October 2, 1974).

Chapter 125 also does not interfere with the PWSA's goal of encouraging development of desirable international design standards for vessels. See PWSA Senate Report at 2783, 2788. It cannot be emphasized strongly enough that Chapter 125 does not involve the "unilateral imposition" of design standards on any vessels, including foreign flag tankers. Foreign flag tankers smaller than 125,000 DWT tons, regardless of their design or equipment, are perfectly free to trade in Puget Sound, and have done so, if they take state pilots and tug escorts. Pilotage and tug escort requirements have always been considered a local prerogative and are not the subject of international accord. Finally, the exclu-

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large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic. Chapter 125, Section 1 (Wash. Rev. Code § 88.16.170).

<sup>66</sup>The committees specifically noted that the West Coast states had expressed the belief that Alaskan oil should be unloaded at offshore deepwater ports.

sion of supertankers from Puget Sound is unrelated to design, construction, and equipment requirements of the sort embodied in international agreements and thus in no way impinges on U.S. efforts to promote the adoption of such agreements.<sup>67</sup>

**c. The Ports and Waterways Safety Act must be interpreted consistently with overall federal policy for protection of the marine and coastal environment.**

Chapter 125 and the PWSA must be set in the context of the overall federal approach to the protection of marine and coastal resources. Other federal statutes, including the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 *et seq.*, the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*, and the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*, expressly

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<sup>67</sup>Even if Chapter 125 were deemed related in some obscure way to the process of achieving international agreement, it must be remembered that the primary thrust of the PWSA is to protect the domestic marine environment by all appropriate means. The PWSA does not commit the United States to an exclusive international regime. Rather, the Senate Commerce Committee, in its Report on the PWSA, made it clear that environmental protection should not be "sacrificed" on the principle of international regulation. PWSA Senate Report at 2783, 2788. In announcing his initiatives on March 18, 1977, President Carter reaffirmed the appropriateness of unilaterally moving ahead of the international community to establish environmentally sound vessel source pollution standards. See Adams statement. In so doing, he implicitly rejected the rationale, often expressed by the Coast Guard in the past, see CG EIS at 4-8 (A. 216-222), that it was necessary to defer to international standards in order to jeopardize ratification of international agreements or risk other adverse international repercussions. In such circumstances, Chapter 125 cannot realistically be regarded as interfering with any federal policy of deference to international forums.

preserve state authority to address sources of water and coastal pollution.<sup>68</sup>

The District Court acknowledged these statutes to be part of the congressional policy of "cooperative federalism" in environmental regulation, and recognized state involvement "in virtually all of [Congress'] water-related regulatory programs." (Juris. Stat., App. C, p. 9a). However, the District Court concluded that since these statutes "explicitly invited state participation," while the PWSA had no express invitation, Congress did not intend to share any regulatory authority over oil tankers and attendant pollution risks. (Juris. Stat., App. C, pp 9a-10a.) The Court in effect reversed the established requirement that state police powers are preempted only where Congress clearly and manifestly intends such a result. The District Court suggested states are preempted unless Congress invites state action. Furthermore, the District Court ignored the teaching of this Court that, absent a clear expression of congressional intent to preempt, the proper approach is to strive

<sup>68</sup>The Court, in *DeCanas v. Bica*, 424 U.S. 351 (1976), recognized the importance of examining other federal statutes to determine congressional intent with regard to preemption. The Court found no intent to preempt California's alien employment law based on the scope and detail of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* The Court found evidence in other federal legislation, i.e., the Farm Labor Contractor Registration Act, 7 U.S.C. § 2041, *et seq.*, that Congress intended that states could, consistent with federal law, regulate employment of illegal aliens. The Farm Labor Act expressly reserved state authority to supplement federal action, although it did not cover all activities covered by the California statute. Nevertheless, the Court found this related federal legislation was "persuasive evidence that the INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations \* \* \* \* 424 U.S. at 362.

to the fullest extent possible to hold the federal and state regulatory efforts in harmony. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 444 U.S. 117, 127 (1973).

The fundamental national policy stated in the Federal Water Pollution Control Act Amendments of 1972, is "to recognize, preserve and protect the primary responsibilities of the states to prevent, reduce and eliminate pollution \* \* \* \* 33 U.S.C. § 1251(b). The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*, which established a program of federal grants to coastal states for developing coastal zone management programs, is based in part upon the finding that,

The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the States to exercise their full authority over the land and waters in the coastal zone \* \* \* \* 16 U.S.C. § 1451(h).<sup>69</sup>

The Estuarine Areas Act of 1968, 16 U.S.C. §§ 1221 *et seq.*, provides:

[I]t is declared to be the policy of Congress to recognize, preserve and protect the responsibilities of the States in protecting, con-

<sup>69</sup>The Coastal Zone Management Act encourages implementation of zoning-type controls to govern the use of land and water resources comprising the coastal zone, which includes Puget Sound. State management programs establishing controls must consider, *inter alia*, economic development. This economic development, including "transportation and navigation," was found to place increasing and competing demands upon the land and waters of the coastal zone. 16 U.S.C. § 1451(c). On June 1, 1976, the Secretary of Commerce approved Washington State's management program for regulation of uses within the state's coastal zone (A. 343). This management program includes all state statutes applicable to the coastal zone, including Chapter 125. With this federal approval all federal programs must be consistent with the state program. 16 U.S.C. § 1456(c).

serving, and restoring the estuaries of the United States. 16 U.S.C. § 1221.

The Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*, which provides for federal licensing of offshore ports for supertankers, declares that its purposes are, *inter alia*, to:

(3) protect the interests of the United States and those of adjacent coastal States in the location, construction, and operation of deepwater ports; and (4) protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law. 33 U.S.C. §§ 1501(a)(3) and (4).

It is difficult to perceive that the same Congress which passed the Federal Water Pollution Control Act and the Coastal Zone Management Act could have intended a complete erasure of state and local authority over one of the prime potential sources of marine and coastal pollution. Passage of the Deepwater Port Act two years later further reinforces the dominant role of states in the regulation of oil transportation and delivery in and adjacent to their marine waters.<sup>70</sup>

Indeed, the Coast Guard itself has advised Congress that, in the absence of conflict, state action on tanker safety is not a hindrance to federal regulatory efforts under the PWSA. See Coast Guard response to questions asked of Admiral Siler by Senator Magnuson, *Hearings on Recent Tanker*

<sup>70</sup>Subsequent, as well as contemporaneous, legislation may be used to determine congressional purpose. See, e.g., *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942).

*Accidents Before the Senate Commerce Committee*, 95th Cong., 1st Sess. 412-64, ser. 95-4 (1977).

After noting that states have traditionally and legitimately required that vessels in foreign trade employ pilots familiar with local waters and environmental conditions, the Coast Guard went on to indicate that other state standards which did not "contradict" existing federal and international requirements were acceptable, specifically stating:

*If the state wished to add on to the existing federal standard, rather than to conflict with it, say to require the use of tugs to address some particular local risks, and if that standard did not impede innocent passage, then the Coast Guard would support that action.*

*Id.* at 463. (emphasis supplied).

The Coast Guard's own statements thus belie any claim that Chapter 125 is preempted as incompatible with the federal regulatory role under the PWSA.

The District Court, accepting the arguments of ARCO in reference to design and construction standards, stated, "Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA." (Juris. Stat., App. C, p. 8a.) Appellants do not believe that this case has anything to do with mandatory design standards. But in any event to view state standard setting as "Balkanization," with all its negative connotations, reflects a mistaken perspective of the proper relationship between state and federal governments in this area. Appellants suggest that Chapter 125 ought

more properly to be viewed as providing a needed and diverse solution to a difficult environmental problem —the kind of creative action which is vital to a healthy federal system. As Mr. Justice Brandeis stated in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Chapter 125, a statute which in no way interferes with federal pollution control efforts, is precisely the kind of progressive state action which should be upheld and encouraged.

## **II. CHAPTER 125 DOES NOT CONFLICT WITH THE CERTIFICATION AND PERMIT PROVISIONS OF THE TANK VESSEL ACT, WITH FEDERAL VESSEL REGISTRATION, ENROLLMENT AND LICENSING LAWS, OR WITH THE MERCHANT MARINE ACT OF 1970 AND THE FEDERAL MARITIME ADMINISTRATION'S TANKER CONSTRUCTION PROGRAM.**

In the District Court, ARCO argued that, although actual conflict in the sense of impossibility of dual compliance did not exist, Chapter 125 nonetheless interfered with the administration and obstructed the realization of the goals of a number of federal enactments, including the certification and permit provisions of the Tank Vessel Act of 1936,

federal vessel registration, enrollment and licensing laws, and the Merchant Marine Act of 1936, as amended in 1970 and the Federal Maritime Administration's tanker construction program.<sup>71</sup> The District Court did not reach the conflict issue, except as regards Chapter 125's provisions for state-licensed pilots on "enrolled vessels."<sup>72</sup> If it had, it would have found ARCO's claims without merit.

### **A. Chapter 125 Does Not Conflict With Federal Certification And Licensing Of Oil Tankers.**

Oil tankers subject to Chapter 125 must obtain federal certificates under the Tank Vessel Act, as amended, 46 U.S.C. § 391a, in order to engage in the transportation of oil, and all United States flag vessels over 20 tons must have federal licenses in order to engage in commerce. The certificates and licenses held by oil tankers do not, however, represent an affirmative and absolute grant of authority to engage in the transport of oil at all times and in all places. Certificates obtained by oil tankers under Section 201(6) of the PWSA, for example, merely indicate that the vessel is in compliance with the rules and regulations promulgated thereunder. Likewise, licenses which may be granted to engage in coastwise trade, see 46 U.S.C. §§ 251-335, are basically issued as a registration device, designed to insure that only certain vessels, i.e., U.S. flag vessels, may engage in trade between U.S. ports. It is clear, in any event,

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<sup>71</sup>ARCO claimed that Chapter 125 was invalid under the authority of *Perez v. Campbell*, 402 U.S. 637 (1971).

<sup>72</sup> See discussion at p. 10, n. 9, *supra*.

that federal certification and licensing does not preclude the State of Washington either from acting in the area of tug escort and alternative design features, or from excluding supertankers from certain parts of the State's waters.

Insofar as Chapter 125's alternative tug escort and design provisions are concerned, these provisions in no way affect the ability of ARCO to utilize federally certificated or federally licensed tankers to carry oil to Puget Sound. Indeed, ARCO has been complying with Chapter 125 since it became effective. Numerous vessels have carried oil to the Cherry Point refinery in that time.<sup>73</sup> In any case, the Court has rejected the contention that the licensing and enrolling of vessels by the federal government gives them a "dominant federal right to use the navigable waters of the United States, free from the local impediment that would be imposed by \* \* \* [a local] ordinance." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 440-47 (1960). As the Court stated at 447:

The mere possession of a federal license \* \* \* does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce.

*See also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-42 (1963) (federally li-

<sup>73</sup>All six oil companies operating refineries on Puget Sound in fact presently supply such refineries using federally licensed and certified tankers.

censed commerce not immunized from "more demanding state regulations.")

Similarly, insofar as the exclusion of supertankers from Puget Sound is concerned, this exclusion, which involves not the whole State but only one particular area of high environmental sensitivity,<sup>74</sup> is not only consistent with the general federal policy of the Deepwater Port Act of 1974, discussed at pages 52 to 53, *supra*, but simply represents the exercise of a traditional state power to refuse entry, for safety's sake, to a vessel whose operation in state ports and waterways is hazardous.<sup>75</sup> Thus, the Court

<sup>74</sup>There are other areas within the State where supertankers might be accommodated. The Northern Tier Pipeline Company has announced plans to construct an oil receiving terminal at Port Angeles, Washington, capable of receiving tankers in excess of 125,000 DWT. (A. 51.) Such a terminal would not be subject to Chapter 125. Additionally, the Oceanographic Commission of Washington reported in January 1975 on three sites located west of Puget Sound within the State of Washington (and therefore not subject to Chapter 125) which are considered reasonably developable as port sites capable of receiving tankers in excess of 125,000 DWT. (A. 75.)

<sup>75</sup>The cases relied on below by ARCO for the proposition that a state may not exclude federally licensed vessels from its waters do not support its argument. *Toye Brothers Yellow Cab Co. v. Irby*, 437 F.2d 806 (5th Cir. 1971), was an economic discrimination and Commerce Clause case in which the Court found that the local authority had "no justifiable local interest" in excluding federally licensed carriers. In *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), the Court simply held that a state's exclusion of a federally licensed carrier from its highways for violating weight limitations was inappropriate when there were conventional forms of punishment available which would accomplish the same purpose. In *Sperry v. Florida*, 373 U.S. 379 (1963), the State of Florida sought to bar an individual who had been granted the right to practice before the Federal Patent Office from engaging in such practice on the grounds that it constituted the unauthorized practice of law. The federal authority specifically granted an unqualified authorization to perform a very narrow function, *viz.*, practice before the Patent Office. Finally, *Gibbons v. Ogden*, 22 U.S. 1 (1824) involved an express license to

stated in *Kelly v. Washington*, 302 U.S. 1, 14 (1973):

When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce.

In this case, the State of Washington has made the judgment that operation of supertankers in Puget Sound is "unsafe" and has properly sought to protect itself against their use. Such limited health or safety-related exclusions have been consistently upheld. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (upholding California regulation excluding federally certified avocados measuring less than 8% oil content); *cf., Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A.2d 1 (Me.), *appeal dismissed*, 414 U.S. 1035 (1973) (upholding the Maine Coastal Conveyance Act which, *inter alia*, authorized the Maine Environmental Improvement Commission to restrict oil tanker operation in sensitive coastal waters).<sup>76</sup>

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engage in interstate business between two points, which was abridged by state economic discriminatory action. Not one of these cases holds that the grant of a general federal license, by itself, immunizes the licensee from a limited exclusionary effect of state police power regulations.

<sup>76</sup>It should additionally be noted that what Washington State has done directly in Chapter 125 is no different from what it, and every state, can accomplish *de facto* through its power to regulate land use in harbor areas, approve docking facilities, and authorize dredging in ports and harbors. Every port and harbor is unique, with its own draft

#### B. Chapter 125 Is Not In Conflict With The Merchant Marine Act of 1970.

ARCO argued to the District Court that the exclusion of supertankers from Puget Sound conflicts with the Merchant Marine Act of 1970, as amended, 46 U.S.C. §§ 1101 *et seq.*, and the Federal Maritime Administration's tanker construction subsidy program implementing that Act. The thrust of its argument was that the Merchant Marine Act of 1970 and the tanker construction program establish a federal policy of encouraging and supporting the construction of supertankers, and that the exclusion of tankers larger than 125,000 DWT "discourages the construction of large tankers," and "threatens the success of the federal program." Such an argument is without basis in law or fact.<sup>77</sup>

*First*, although there are specific references in the legislative history of the Merchant Marine Act of 1970 to the need to "produce ships of high productivity" and of increased "lift capacity," there is nowhere in the legislative history a specific reference to the need to construct "supertankers." *See generally S. Rep. No. 91-1080, 91st Cong., 2nd Sess. (1970); 116 Cong. Rec. 16588-615 (1970) (House Debate);*

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limitations and specific hazardous conditions. If the state prohibits, as it validly may, the construction of a docking facility for the supertankers or the dredging of deeper channels, they are effectively excluded. *State of Washington Shoreline Management Act*, Wash. Rev. Code ch. 90.58. The State of Washington has exercised analogous power to achieve proper state goals.

<sup>77</sup>As discussed at 52, *supra*, the exclusion of supertankers from Puget Sound is primarily the result of natural geographic conditions, rather than Chapter 125.

116 Cong. Rec. 32487-512 (1970) (Senate Debate). In fact, the program is a broad-based one designed generally to "modernize" the U.S. fleet and is not aimed exclusively at oil tankers.<sup>78</sup>

*Second*, and more importantly, the tanker construction program, insofar as it has sought to encourage supertanker construction as part of a "balanced fleet,"<sup>79</sup> has been and is integrally related to a program to develop new, *offshore* port facilities specifically to accommodate supertankers which cannot be accommodated in existing ports. See Federal Maritime Administration, *Final Environmental Impact Statement on Tanker Construction Program* II-3, IV-63, IV-102 (N.T.I.S. Report No. EIS 730725-F, May 30, 1973). The Maritime Administration's goals in this regard have in effect been achieved through the enactment of the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.* The salient fact about that legislation, as it affects ARCO's claims, is that it reflects a general agreement that the environmental risks associated with the use of supertankers should be minimized by siting port facilities for them far

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<sup>78</sup>The oil tankers to be subsidized, it should be noted, are only those used in U.S.-foreign trade. (A. 60, 61.)

<sup>79</sup>Supertanker construction, it must be emphasized, is only one part of the tanker construction program. Through the spring of 1976, two-thirds of the tankers whose construction had been or was being subsidized by the Maritime Administration had been smaller than 125,000 DWT. (A. 60.) Moreover, in light of the huge surplus capacity in the world tanker fleet, and the continuing cancellation of orders, it is open to question how many new, larger tankers will be ordered in the next five to ten years, regardless of any federal policies.

offshore, away from sensitive estuarine environments and crowded, existing ports and waterways, such as Puget Sound.<sup>80</sup> The environmental purpose of the legislation is well expressed by one of its sponsors, Senator Hollings:

Deepwater ports are also considered preferable from an environmental point of view. Keeping oil-carrying vessels offshore lessens the possibility of collisions and grounding in crowded harbor areas where most oil spill mishaps occur. In addition, estuaries and coastal wetlands are the most sensitive to oil spill damage. Deepwater ports would remove oil vessel movements out to deeper water. The possibility of damage to coastal ecosystems from an oil spill from such a port is much reduced \* \* \* \* Overall, it has been concluded that offshore supertanker terminals offer the greatest environmental advantages of deep draft harbor design.

Statement of Senator Ernest Hollings, 120 Cong. Rec. 34625 (1974).

Chapter 125, far from being inconsistent with the Merchant Marine Act tanker construction program, supports and implements the general federal judgment that supertanker use should be confined to offshore terminals, where environmental risks can be minimized, and kept at a distance from sensitive estuaries such as Puget Sound.

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<sup>80</sup>This was indeed the view of the Maritime Administration. See Statement of Clayton Cook, General Counsel of the Maritime Administration, *Joint Hearings on S.1751 and S.2232 Before the Special Joint Subcommittee on Deepwater Ports Legislation of the Senate Committees on Commerce, Interior and Insular Affairs and Public Works*, 93rd Cong., 1st Sess. 283, 284 (1973).

### **III. CHAPTER 125 DOES NOT INTERFERE WITH INTERNATIONAL AGREEMENTS OR WITH FEDERAL POWERS TO MAKE TREATIES AND TO CONDUCT FOREIGN AFFAIRS.**

Appellants have already discussed the contention that Chapter 125 interferes with the process of negotiating international marine pollution agreements. Chapter 125's provisions are simply unrelated to the kind of international agreement on standards of tanker design, construction or operation which the United States has sought or might seek. Accordingly, Chapter 125 has no impact on the treaty-making or treaty ratification process. See discussion on pages....., *supra*. Thus, it cannot be deemed inconsistent with the federal power to make treaties (Article II, Section 2, Clause 2 of the Constitution) and any implied power to conduct foreign affairs.<sup>51</sup>

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<sup>51</sup>Even assuming that such an impact could be found, there is no case which holds that, independent of a statute or treaty, and in the absence of any undue burden on foreign commerce, state legislation designed to protect the health, safety and environment of state citizens may be held unconstitutional on the grounds that it interferes with federal power to make treaties and the implied federal powers to conduct foreign affairs. To the contrary, it has been held that state police power regulation may be proper even when it may have indirect effects on foreign affairs. *Alaska v. Bundrant*, 546 P.2d 530 (Alaska), appeal dismissed *sub nom. Uri v. Alaska*, 97 S. Ct. 40 (1976). *Zshernig v. Miller*, 389 U.S. 429 (1968), on which ARCO relied below, involved adjudication of property rights by a state probate court, based upon determinations of an explicit international or foreign affairs nature, e.g., whether the representation of counsels, ambassadors or other representatives of foreign nations is credible or made in good faith, and is plainly inapposite here. Not only are no such foreign affairs determinations made by state authorities in the instant case, but it would be a remarkable and unprecedented extension of *Zshernig* to apply its holding to area in which states are exercising well-established powers to protect the health and safety of their

ARCO, however, made several additional foreign affairs-related arguments which, in essence, boil down to claims of conflict with treaty obligations:<sup>52</sup> (1) that Chapter 125 interferes with the rights of innocent passage of foreign flag vessels transiting Puget Sound; (2) that Chapter 125 interferes with certain bilateral boundary water treaties with Canada; and (3) that Chapter 125 interferes with multilateral instruments aimed at reducing marine pollution. The District Court reached none of these arguments. None is valid.

#### **A. Application Of Chapter 125 Has Not Violated The Right To Innocent Passage Of Foreign Flag Tankers.**

Application of the requirements of Chapter 125 to foreign flag vessels in transit through Puget Sound has not violated the so-called right of "innocent passage" embodied in Article 14 of the Convention on the Territorial Sea and the Contiguous Zone [1964], 15 U.S.T. 1606, T.I.A.S. No. 5639 (the "Territorial Sea Convention"). Because there is no evidence that

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citizens through regulation of vessels carrying hazardous cargoes—regulation long held lawful as to vessels of all registries. See, e.g., *The James Gray v. The John Fraser*, 62 U.S. (21 How.) 184, 187 (1858); *The Merrimac*, 81 U.S. (14 Wall.) 199, 203 (1871).

<sup>52</sup>Because a treaty is "the supreme Law of the Land" under Article VI, Clause 2, of the Constitution, see, e.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), conflicting state law cannot stand. While it is undisputed that no existing treaty, convention or agreement to which the U.S. is or may become a party contains any provision which by its terms would prohibit parties from prescribing additional, more stringent standards for vessels entering their jurisdiction (A. ....) ARCO nonetheless has maintained that Chapter 125 in effect obstructs the realization of their objectives. This argument, of course, simply involves application of general rules of preemption and has nothing to do with interference with foreign affairs powers as such.

there has been any traffic to British Columbia ports by tankers larger than 125,000 DWT (A. 66), and because it is hypothetical and speculative whether such traffic will ever occur, the only innocent passage issue ripe for determination at this time relates to the application of the pilotage and tug escort provisions of Chapter 125 to vessels between 40,000 and 125,000 DWT. Cf., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973). As to such traffic, U.S. obligations to respect innocent passage are unaffected by Chapter 125.

*First*, to the extent that Puget Sound (or parts thereof) constitute "internal waters" of the Nation, as distinguished from the "territorial sea," the right of innocent passage just does not apply. Colombos, *The International Law of the Sea*, 87-88 (6th Ed. 1967); see also *United States v. Louisiana*, 394 U.S. 11, 22 (1969). The State of Washington legislature has generally defined "Puget Sound" only to mean "all the *inland waters* of the State of Washington inside the international boundary line between the State of Washington and British Columbia \* \* \* \*." Wash. Rev. Code § 88.16.050 (emphasis added.) The U.S. Government, moreover, has never indicated that any parts of Puget Sound, including Haro and Rosario Straits are other than "internal waters" of the United States, in which foreign ships do not have the right of innocent passage.

*Second*, even if the doctrine of innocent passage

were applicable, it is subject to reasonable regulatory requirements to protect the coastal state, such as those embodied in Chapter 125.<sup>83</sup>

The problem of innocent passage was fully considered during congressional deliberations on the PWSA itself. It was the conclusion of the Senate Commerce Committee that reasonable regulations designed to protect our national environment would not impede the right of innocent passage. The Senate Commerce Committee stated:

[T]he right of innocent passage is not absolute and it is recognized under international law that foreign flag vessels may be obligated to comply with orders and maritime regulations which contribute to the safety of navigation or that are of a sanitary or police character. It seems clear that the regulations contemplated in H.R. 8140 are of this nature. PWSA Senate Report at 2793-94.

If regulations for the safety of navigation or of a sanitary or police character under the PWSA do not impede innocent passage, neither does application of the requirements of Chapter 125—a State statute intended to accomplish the same purpose.

#### B. Chapter 125 Does Not Violate Boundary Water Treaties With Canada.

Various treaties and international agreements define the boundary line between the United States and Canada (A. 95.) Vessels bound for Vancouver from the Pacific Ocean do occasionally pass through

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<sup>83</sup>See generally Colombos, *The International Law of the Sea* 88 (6th ed., 1967); O'Connell, II *International Law* 630 (1970).

U.S. waters in making this transit (A. 64), although it is possible to navigate to British Columbia ports without entering Washington State waters. Two treaties are claimed to have an effect on this traffic: (1) the Treaty with Great Britain in Regard to Limits Westward of the Rocky Mountains, 9 Stat. 869, signed June 15, 1846, entered into force July 17, 1846 (the "1846 Treaty"); and (2) the Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, 36 Stat. 2448, signed January 11, 1909, proclaimed May 13, 1910 (the "1910 Treaty"). Even if ripeness were not again a bar to adjudication, it is clear that neither treaty is violated by Chapter 125.

The 1846 Treaty provides, in Article I, that "the navigation of the whole of the said channel and straits \* \* \* [shall] remain free and open to both parties [i.e., the United States and Great Britain]." However, the language "free and open" in the treaty has never been interpreted to mean completely unregulated. Local statutes of a regulatory nature have in fact for decades been applied without challenge to all vessels entering Washington State waters.<sup>84</sup>

The 1910 Treaty, for its part, does not apply to Puget Sound but rather to:

<sup>84</sup>See, e.g., a prohibition against discharging ballast in waters of certain depths (Laws of Washington Territory 1860, p. 124); a prohibition against desertion of ships on Puget Sound and establishing a defense for the indictment (Laws of Washington Territory 1860, pp. 329 *et seq.*); establishment of a scheme for pilotage, for a pilotage commission, and for duties for pilots on the waters of Puget Sound, the Strait of Juan de Fuca, and adjacent straits (Laws of Washington Territory 1868, pp. 33 *et seq.*).

The waters from main shore to main shore of the lakes and rivers and connecting waterways, or portions thereof \* \* \* between the United States and \* \* \* Canada.

These boundary waters have consistently been interpreted to mean "fresh" and not "salt" waters. Bloomfield and Fitzgerald, *Boundary Water Problems of Canada and the United States* 17 (1958).

**C. Chapter 125 Does Not Conflict With Any Multilateral Marine Pollution Treaty, Convention Or Agreement.**

Trade in petroleum is worldwide in scope and there is much in the way of international regulation of oil transport. (A. 92-95.) But merely to state that there is a variety of international treaties, agreements and conventions, many of which are not in force, or have not even been ratified by the United States, is to prove little. The question is how do these international agreements, treaties and conventions affect the rights of the United States to regulate tanker pollution. The answer is, at least as far as the three major conventions of even arguable relevance to this case are concerned: not at all.<sup>85</sup>

<sup>85</sup>Certain multilateral agreements plainly have nothing to do with the issues here. The International Convention for Civil Liability for Oil Pollution Damage, [1969], and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, [1971], neither of which has been ratified by the United States, relate solely to liability and compensation for pollution damage. The International Convention Relating to Intervention on the High Seas in the Cases of Oil Pollution Casualties, [1969], 26 U.S.T. 765, T.I.A.S. No. 8068, together with its 1973 Protocol, deals solely with actions a nation may take on the high seas after an oil spill has occurred. The International Convention on Load Lines, [1966], 18 U.S.T. 1857, T.I.A.S. No. 6331, simply establishes the maximum draft by which a ship

**1. The International Convention for the Prevention of Pollution of the Sea by Oil, 1954.**

The International Convention for the Prevention of Pollution of the Sea by Oil, [1954], 12 U.S.T. 2989, T.I.A.S. No. 4900, as amended, 17 U.S.T. 1523, T.I.A.S. No. 6109 (the "1954 Oil Pollution Convention"), is today the only international agreement in force, the primary purpose of which is to regulate tanker-generated pollution. But what is significant about the Convention is that it fully reserves the rights of Contracting Parties to take whatever action they deem appropriate within their jurisdiction. Article XI of the Convention states:

Nothing in the present Convention shall be construed as derogating from the powers of any contracting government to take measures within its jurisdiction in respect to any matter to which the Convention relates \* \* \* \* .

The Senate Report on the Convention is instructive. In recommending its approval, the Senate Foreign Relations Committee suggested the following "Reservation":

In accepting the Convention the United States declares that it does so subject to the understanding that Article XI effectively reserves to the parties to the Convention freedom of legislative action in territorial waters, including the application of existing laws, anything in the Convention which may appear to be contrary

can be loaded and does not relate directly to protection of the marine environment. The International Regulations for Preventing Collisions at Sea, [1960], 16 U.S.T. 794, T.I.A.S. No. 5813, revised 1972, establish certain vessel procedures to reduce the likelihood of collision, but are unrelated to and unaffected by the provisions of Chapter 125.

notwithstanding. Specifically, it is understood that offenses in U.S. territorial waters will continue to be punishable under U.S. laws regardless of the ships' registry. S. Rep. No. 666, 87th Cong., 1st Sess. (1961).

This "Reservation" established the fundamental principle, to which the United States has never ceased to adhere, that international treaties to which the United States is a party should not restrain our flexibility to establish local rules and regulations, as appropriate, to protect our national environment. Necessarily, the Convention in no way reflects upon the allocation of power between the federal and state governments to take the lead in setting such standards. Indeed, in the face of a claim that the Maine Coastal Conveyance Act interfered with the conduct of foreign affairs and conflicted with international treaties, particularly the 1954 Oil Pollution Convention, the Supreme Judicial Court of the State of Maine specifically held that because Article XI of such Convention makes plain an intent not to affect rules governing the territorial sea, a state's power to regulate is not affected thereby. *Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A.2d 1, 46-47 (Me.), appeal dismissed, 414 U.S. 1035 (1973).

**2. The International Convention for the Safety of Life at Sea, 1960.**

ARCO attached great importance in its brief before the District Court to the International Convention for the Safety of Life at Sea, [1960], 16

U.S.T. 185, T.I.A.S. No. 5780 ("SOLAS"), which is in force and to which the United States is a party. While it does contain provisions specifying design, equipment and inspection requirements for oil tankers, among other vessels, SOLAS is a treaty primarily designed to ensure the safety of human life on all types of vessels. By its terms, certificates of compliance only must be accepted for the purpose of ensuring "safety of life." SOLAS, Article I(b). The Senate Commerce Committee, during its consideration of the PWSA, soundly rejected the contention that unilateral imposition of U.S. environmental standards on vessels entering U.S. navigable waters might be inconsistent with SOLAS, stating:

[J]ustifiable concerns were expressed about the unilateral application by the United States of standards on vessels of foreign registry. Initially, there was even concern that this might constitute violation of our obligations under international treaty.

The primary treaty in this regard is the Safety of Life at Sea Convention (SOLAS). However, that Convention relates to *safety* rather than protection of the marine environment. And its regulations relating to construction are directed primarily to passenger vessels, which would not be covered by H.R. 8140. Regulations applying to other vessels under SOLAS are largely procedural in nature rather than setting forth construction standards.

PWSA Senate Report at 2782-83.

If application of design and construction requirements to vessels under the PWSA does not violate SOLAS, by the same reasoning, neither would appli-

cation of any provisions of Chapter 125, which are substantially less restrictive than actual design and construction requirements.<sup>86</sup>

### **3. The International Convention for the Prevention of Pollution from Ships, 1973.**

The International Convention for the Prevention of Pollution from Ships, [1973], opened for signature in November 1973 (the "1973 Marine Pollution Convention"), is the most detailed convention negotiated to date concerned with the direct regulation of vessel source pollution. The 1973 Marine Pollution Convention has not yet entered into force, nor has it yet been ratified by the United States. But, in any case, it is clear that it, like the 1954 Oil Pollution Convention, in no way restricts the U.S. right to impose additional more stringent standards for tankers which enter U.S. territorial waters. As Russell Train, Chief Negotiator of the 1973 Marine Pollution Convention, stated during hearings held November 14, 1973, before the Senate Commerce Committee:

"The Convention in no way restricts the rights of states to set more stringent standards within their jurisdiction." See generally *Hearings on the 1973 IMCO Conference on Marine Pollution*

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<sup>86</sup>Obviously, the State of Washington's exclusion of supertankers from Puget Sound is also consistent with the type of action which might be taken under the PWSA. Section 201(13) of Title II of the PWSA provides:

"The Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States to any vessel not in compliance with the provisions of this section or the regulations promulgated thereunder."

And the right to exclude vessels from entry is well recognized under international law. See Whiteman, *Digest of International Law*, 186-88, 216-17, 250-51 (1965).

*From Ships Before the Senate Committee on Commerce, 93d Cong., 1st Sess. 2-13, ser. 93-52 (November 14, 1973).*

Thus, the latest convention, as with the previous conventions, continues the understanding that U.S. international obligations shall not derogate from United States' prerogatives to seek to eliminate the risk of pollution from foreign flag vessels entering U.S. navigable waters.

#### **IV. CHAPTER 125 IS A VALID EXERCISE OF THE STATE POLICE POWER UNDER THE COMMERCE CLAUSE.**

ARCO claimed below that Chapter 125 interfered with a need for national uniformity and unduly burdened interstate and foreign commerce, and thus was invalid under the Commerce Clause (Article I, Section 8, Clause 3).<sup>57</sup> The District Court found it unnecessary to reach this contention because it held the statute preempted.

Should the Court decide that Chapter 125 has not been preempted, the Commerce Clause question also should be decided for at least two reasons: one, the factual record is complete; and two, since there is a history of full compliance by ARCO with Chapter 125 since September 8, 1975, it is possible to determine clearly what interference, if any, the statute has on interstate commerce.

<sup>57</sup>At the outset, it must be noted, as in the preemption field, state police power statutes "carry a strong presumption of validity when challenged in court." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959). There is, as noted above, no claim that Chapter 125 is an invalid exercise of the state police power.

As with preemption, the resolution of claims that the Commerce Clause has been violated " \* \* \* turns on the unique characteristics of the statute at issue and the particular circumstances in each case." *Boston Stock Exchange v. State Tax Commission*, ..... U.S. ...., 97 S. Ct. 599 (1977). The "unique characteristics" of Chapter 125 and the "particular circumstances" of this case demonstrate that Chapter 125 does not in any way impermissibly infringe on interstate commerce.<sup>58</sup>

##### **A. The Subject Matter Regulated Does Not Require A Uniform National Rule.**

Chapter 125 is designed to reduce the risk of pollution of the inland waters of the State of Washington. The Court has long recognized the importance of local control over the waters of a state for purposes of protecting environmental values and consequently has never deemed such regulation a subject requiring national uniformity.

The Court has uniformly found that a subject is suited to local regulation where it touches on health and safety or environmental protection. See, e.g., *California v. Zook*, 336 U.S. 725 (1949); *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963); *Terminal Railroad Association v. Brotherhood of Railroad*

<sup>58</sup>ARCO cannot argue that Chapter 125 discriminates against interstate commerce in favor of local interests. Two-thirds of all oil imported into Washington State is consumed by its residents who, therefore, pay the increased costs caused by the enactment of Chapter 125. (A. 48-49.). See *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939).

*Trainmen*, 318 U.S. 1 (1943). The Court has also consistently upheld state statutes designed to protect a state's natural resources. *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950); *Geer v. Connecticut*, 161 U.S. 519 (1896); *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); and *Skiriotes v. Florida*, 313 U.S. 69 (1941). The different needs and peculiar features of varied port areas, as noted above, have long been held to negate any purported claims for national uniformity.<sup>89</sup> See pp. 26, 27. We are aware of no case that held that national uniformity is required in the field of regulation of pollution from tankers. As the Court stated in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 267 (1935):

State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden.

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<sup>89</sup>Congress itself has recognized the importance of local regulation of inland marine pollution. See, for example, the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. §1251(b); the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*; the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501 *et seq.*

With respect to operational requirements for oil tankers, the Ports and Waterways Safety Act itself, as well as Coast Guard implementation thereof, recognizes that a diversity of local conditions may call for a diversity of appropriate solutions. Both the Senate and House Reports on the legislation emphasize the port by port approach mandated by the Act, taking into account varying local environmental hazards. PWSA Senate Report at 2791-2792; PWSA House Report at 8. And even the Coast Guard's general regulatory proposals, see 39 Fed. Reg. 24157 (June 28, 1974) (Exhibit S), 41 Fed. Reg. 18766 (May 6, 1976), recognize that operating requirements may differ as a function of particular navigational hazards.

The fact that Chapter 125 regulates instrumentalities in interstate commerce does not make the case for local control any less compelling. State regulation of vehicles engaged in interstate commerce has regularly been sustained. This includes regulation of trucks, *South Carolina Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938); vessels, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); railroads, *Erb v. Morasch*, 177 U.S. 584 (1900), and *Chicago, R.I. & P.R.R. Co. v. Arkansas*, 219 U.S. 453 (1911); and barges, *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865).

The Commerce Clause is not a sanction for a large national corporation to prevent the State of Washington from protecting a significant natural resource, under the guise of a claim of need for national uniformity. The contention that Chapter 125 imposes impermissibly on a national oil transportation system, or for that matter, on national vessel traffic, is conveniently to ignore the provisions of the Washington statutory scheme.

First, the tug escort, alternative design and pilotage provisions have no impact on any national transportation system, if one exists. Indeed, most ports have differing pilotage and tug requirements, and the alternative design provisions do not prevent the entry of any tanker into Puget Sound.

Second, as to the supertanker access limitation of Chapter 125, the State of Washington does not exclude supertankers from all its waters or limit the importation of oil. Chapter 125 permits supertank-

ers to off-load west of the access limit line, where the maneuvering room is greater and where there would be less damage to state resources from an oil disaster.

Beyond that, the State of Washington has a right to exclude supertankers from Puget Sound. This can be demonstrated in several ways. First, as the discussion above concerning the Deep Water Port Act of 1974 and the Coastal Zone Management Act of 1972 demonstrates, Congress has provided the states with an absolute veto over the presence of supertankers in nearby waters, even those beyond the states' boundaries.

Moreover, there is no requirement for uniform action with regard to vessel size limitations. Vessel size limitations will vary as a function of controlling depth and other factors, quite apart from state or local regulatory action in a field where lack of uniformity has been the rule.

Finally, there is no case that denies this power to the State. *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), the primary case upon which ARCO relied below to support its uniformity contention, does not support the claim of uniformity in pollution regulation cases. The Court itself in that decision stated, in distinguishing *South Carolina Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938), a case that upheld the right of a state to regulate the size of trucks passing in interstate commerce:

[R]egulations of the use of the highways are

akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.

(Citations omitted.)

303 U.S. at 187-88.<sup>90</sup>

The instant case is not one involving an interstate common carrier which must repeatedly separate and reconstitute its vehicles as they pass from state to state, *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), or which cannot use the same vehicle in other states without performing burdensome modifications to it, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). There is no evidence before the Court that the supertanker access limitation has disrupted ARCO's shipping activity or unconstitutionally burdened it, but only evidence that ARCO may have been forced to behave in a way it may have preferred not to.

Simply put, there never has been nor is there presently, any need for nationally uniform regulation of tug escorts or vessel size limitations on navigable waters under the terms of the Commerce Clause.

#### **B. Chapter 125 Does Not Unconstitutionally Burden Interstate Commerce.**

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<sup>90</sup>The other case relied on by Atlantic Richfield and Seatrain for their uniformity claims, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), was decided on the ground that the burden of the state regulation outweighed its dubious benefit, 359 U.S. at 530, and has little relevance to any purported need for national uniformity. Obviously, the optional design provisions cannot impinge on or burden any commerce because they are not required by Chapter 125.

When considering the validity of a state regulation under the Commerce Clause, the Court has sometimes weighed the burden upon interstate commerce against the interests which the regulation is designed to promote. However, this is not a proper case in which to weigh the value of the benefits of Chapter 125 to the citizens of the State against the costs to the oil companies, since the public value and the industry's economic burdens are noncomparable. In *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R. Co.*, 393 U.S. 129, 138-39, 140 (1968), the Court said:

This summary, taken from evidence heavily relied upon by the railroads and generally favorable to their position, leaves little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives.

\* \* \*

It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways. We certainly cannot do so on this showing.

Other courts have rejected also the balancing approach. See *Construction Industry Association v. Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976); and *American Can Co. v. Oregon Liquor Control Commission*, 15 Ore. App. 618, 517 P.2d 691 (1973), review denied, *Id.*, (Ore. 1974), which relied on *Brotherhood of Locomotive Firemen*

& Enginemen v. Chicago, R.I. & P.R.R., *supra*.<sup>91</sup>

Chapter 125 does no more than permit Washington State to exercise its traditional police powers to protect for its citizens and the citizens of the country the enormous economic and environmental resources of Puget Sound. No claim is made by any party that the interests protected by Chapter 125 are insubstantial, and any attempt to balance its intangible benefits and alleged burdens is but an effort to second-guess a legislative determination that Chapter 125 is a reasonable response to the perilous possibility of insidious oil spills.

If, nevertheless, a balancing approach is to be applied here, it is essential to bear in mind on whose shoulders the burden of proof falls. Since Chapter 125 is entitled to a presumption of constitutionality, it is ARCO's responsibility to prove both the magnitude of the burdens and the statute's ineffectiveness as one solution to the problems of oil pollution from tankers. The burden is on ARCO to produce evidence, not to go forward with mere rhetoric. The State need not prove that the means chosen to achieve the legitimate local purposes are in all respects effective. As noted by the Court in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R. Co.*, 393 U.S. 129, 138-39 (1968):

The District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the

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<sup>91</sup>Cases that have used a balancing approach, such as *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), are cases involving competing economic interests and are not applicable here.

legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was "pure speculation."

ARCO utterly failed below to carry its burden. With regard to the effectiveness of Chapter 125 as a means to protect the ecology and economy of Puget Sound from the devastation of major oil spills, the view of the evidence most favorable to ARCO shows at the very most that there is room for good faith dispute. (A. 84.) Moreover, the record plainly demonstrates that the burden of Chapter 125 is minuscule, problematic and speculative. This is indicated by examining the facts.

First, ARCO and the five other refineries on Puget Sound have complied with Chapter 125 since it became effective. (A. 44.) To the present time there has been no reduction in the amount of oil processed at the Puget Sound refineries as a result of Chapter 125, and the six oil companies operating refineries in Puget Sound at present adequately supply their refineries using tankers of less than 125,000 DWT. (A. 68.) The only refinery on Puget Sound affected by the 125,000 limitation is ARCO's refinery at Cherry Point and the effect on that refinery is minimal.

ARCO itself owns or operates 14 tankers, none of which is over 120,000 DWT and four of which are under the 40,000 DWT limitation. (A. 52-53.) Cherry Point received only six vessels

greater than 125,000 DWT in the four years preceding the enactment of Chapter 125, the largest of which was 138,000 DWT. (A. 113.) Cherry Point was designed and built to refine Alaska oil. That oil is expected to begin to flow in 1977, and ARCO plans to ship its share to Cherry Point, which will amount to 100% of that refinery's capacity.<sup>92</sup> (A. 49.) Thus there will be little or no foreign trade at all and few, if any, foreign supertankers will deliver oil to the only facility in Puget Sound capable of receiving supertankers. The fact that there may be a large or small number of foreign flag supertankers that could theoretically call at Cherry Point is hopelessly irrelevant to this case. As a practical matter the only arguable effect of the supertanker limitation, therefore, may be on ARCO's ability to use two 150,000 DWT supertankers it is building (A. 53) and one or two other U.S. flag supertankers eligible for the coastwise trade, although there is nothing in the record to indicate that it could charter these vessels owned by others.<sup>93</sup>

Second, the burden of the tug escort requirement of Chapter 125 is minuscule—\$.0087 per barrel for a tanker of 120,000 DWT (A. 68), not even a penny a barrel. Likewise, there is a very minor increase in cost that occurs in operating a 120,000

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<sup>92</sup>It is important to realize that a single delivery from one of the 120,000 DWT tankers supplies Cherry Point's daily capacity nine times over.

<sup>93</sup>In the overall economics of bringing oil from the ground to the consumer " \* \* \* the cost of sea transportation is one of the least expensive elements." PWSA Senate Report at 2767.

DWT as opposed to a 138,000 DWT tanker, the largest ship that has ever docked at Cherry Point. The exact amount of the difference is not spelled out in the record. Even if ARCO intended to use its uncompleted 150,000 DWT ships on the Valdez-Cherry Point run, the cost difference is estimated to be approximately \$.04 a barrel.<sup>94</sup> (A. 64.) These costs are trivial when compared to the current world well head price of over \$12 per barrel. Of equal importance, as the Supreme Court noted in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R. Co.*, 393 U.S. 129, 140 (1968), costs alone are never grounds for invalidating a state statute:

It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways. Accord; *American Apparel Manufacturers Association v. Sargent*, 384 F. Supp. 289 (D. Mass. 1974); *Procter & Gamble Co. v. Chicago*, 509 F.2d 69 (7th Cir.), cert. denied, 421 U.S. 978 (1975).

Another cost factor to be considered is that of cleaning up a massive oil spill in the confined waters of Puget Sound. The largest oil spill that has occurred to date in the Sound was 20,000 gallons, or approximately 476 barrels. The clean-up cost exceeded \$50,000 (A. 84). This amount of oil is about 66 tons—an infinitesimal amount compared to the 26,000 tons lost by the *Argo Merchant* off the

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<sup>94</sup>While Seatrain argued that Chapter 125 impeded its ability to sell its supertankers, there is nothing in the record to support that contention.

coast of Massachusetts last winter. The costs of cleaning up an oil spill of the size of the *Argo Merchant*, assuming a very conservative \$2 a gallon, a lower cost of any spill in Puget Sound to date, would be approximately \$15 million.<sup>95</sup> It is conceded here that it is not known whether oil spills of 20,000 gallons and greater in Puget Sound could be cleaned up under existing capabilities without significant damage to public and private property first taking place. (A. 84). It is appropriate to spend a few pennies a barrel to lower the risk of costly oil spills and oil pollution damages. Even assuming that a process of weighing benefits against burdens on interstate commerce is considered appropriate, the state benefit created by Chapter 125 is significantly higher than any demonstrated effect on interstate commerce.

Arrayed against these almost negligible costs are the enormous benefits resulting from decreasing the risk and number of oil spills. Puget Sound is priceless and more than worthy of protection—a glacially formed estuary whose physical characteristics are unique in the “lower 48” states (A. 68, 69); whose waters lap islands, marshes, tidal flats, bays and inlets (A. 68, 69); where clean and productive waters support a fishery resource valued at \$170 million a year (A. 69-70, 71); whose beds and tidelands are valued in excess of \$2 billion (A. 73); where more than \$125 million annually is spent on recreational

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<sup>95</sup>This approximately would equal the cost to ARCO of 55 years of compliance with the tug escort provisions.

boating (A. 73); where 65% of the State's people choose to make their homes (A. 73); where many species of birds and marine mammals feed and flourish (A. 72); where fish and wildlife preserves and refuges, and over 150 public parks, are located (A. 74); where ferries carry passengers on 11 major and picturesque routes (A. 74); and where significant scientific research and educational programs are conducted (A. 74-75). The benefit from reducing the risk and potential size of an oil spill in this precious place—a benefit that the Washington Legislature is empowered and obliged to promote—is simply enormous.

#### **V. THE ELEVENTH AMENDMENT PRECLUDES JURISDICTION OF THE DISTRICT COURT OVER THE STATE OF WASHINGTON APPELLANTS.**

State of Washington appellants Dixy Lee Ray, et al., contended below, and contend here, that (1) the real party defendant in the action below was the State of Washington, (2) the Eleventh Amendment therefore barred the District Court from hearing ARCO's suit, and (3) the line of cases interpreted as giving jurisdiction to federal courts to hear the type of action brought by ARCO should not be applied to this case.

The Eleventh Amendment has been stretched by the Court in two directions: to cover cases not comprehended literally by its language;<sup>96</sup> and not to cover

<sup>96</sup>See, e.g., *Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 323 (1973) (Brennan, J., dissenting); *Parden v. Terminal*

cases where its language should afford relief to a state.<sup>97</sup>

The Eleventh Amendment clearly provides specific, rather than general, immunity for states from suits in federal court. Under its terms states are not immune from suits brought by citizens of another state, but only from such suits brought in federal court. The Amendment's purpose was, and its effect is, jurisdictional.<sup>97a</sup>

ARCO's cause of action was one that could and should have been brought in state court. The State of Washington, through its Uniform Declaratory Judgments Act, ch. 7.24, Wash. Rev. Code, provides the means. The Act provides, in part, as follows:

A person \* \* \* whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, stat-

*Railway Co.*, 377 U.S. 184, 186 (1964). It has been held that, although the express language of the Amendment does not bar such suits, the Amendment confers on an unconsenting state immunity from suit in federal courts by one of its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>97</sup>Fictions have been employed in the process. The result is that: Nobody knows anymore what to make of the Eleventh Amendment, and surely litigants and Courts are hampered by the abrupt wrinkles in the Eleventh Amendment fabric.

Comparatively little has been written on the Eleventh Amendment, but what has appeared in the literature through the years show how incomprehensible the Eleventh Amendment doctrine has become.

Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 Hous. L. Rev. 1, 24 (1967) (emphasis supplied).

<sup>97a</sup>It is clear that this suit, even though it does not seek to impose a financial liability on the State treasury, is as much a suit against the State as one in which the State is the named party. No one seriously believes otherwise.

ute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. Wash. Rev. Code § 7.24.020.

The elements requisite for the application of the Declaratory Judgments Act are present in this controversy. See, *Acme Finance Co. v. Huse*, 192 Wash. 96, 107, 73 P.2d 341, 345 (1937).<sup>98</sup>

ARCO's opposition below relied upon *Ex parte Young*, 209 U.S. 123 (1908), which held that the Eleventh Amendment does not bar a federal court from entertaining a suit against a state attorney general seeking to enjoin enforcement against railroads of statutes and orders asserted to violate the Fourteenth Amendment. This decision has been described as a "watershed case which sanctioned the use of the Fourteenth Amendment to the United States Constitution as a sword as well as a shield against unconstitutional conduct of state officers \* \* \*." *Juidice v. Vail*, 97 S. Ct. 1211, 1217 (1977).

The holding of *Ex parte Young* is dependent on the underlying facts of the case.<sup>99</sup>

<sup>98</sup>Rights under the Federal Constitution are cognizable under the Act, as well as rights under the State Constitution. See, e.g., *Nostrand v. Little*, 58 Wn.2d 111, 116-117, 361 P.2d 551 (1961), appeal dismissed, 368 U.S. 436 (1962); *Huntamer v. Coe*, 40 Wn. 2d 767, 289 P.2d 489 (1952). Cf., Peck, "Standing Requirements for Obtaining Judicial Review of Governmental Action in Washington," 35 Wash. L. Rev. 362, 387-392 (1960).

<sup>99</sup>In 1907, the Minnesota Legislature enacted a statute which reduced allowable railroad passenger rates by 33 percent. In the same year, the Minnesota Railroad and Warehouse Commission ordered railroad freight rate reductions of from 20 to 25 percent. Because non-compliance with the passenger rate act was made a felony, the constitutionality of its provisions could be challenged in a state court proceeding only by violating the statute and thereby suffering the

The Court's conviction that the railroads were effectively blocked from trying the constitutionality of the act in state court led to its decision:

It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. *Ex parte Young*, 209 U.S. 123, 147 (1908).<sup>100</sup>

The situation here is obviously different.

The holding of *Ex parte Young* has been criticized ever since it was rendered.<sup>101</sup>

The first Justice Harlan correctly argued in his dissent against the basis of the *Ex parte Young* decision:

[T]he suit \* \* \* was, as to the defendant Young, one against him *as, and only because he was*, Attorney General of Minnesota. No relief was sought against him individually but only in his capacity *as* Attorney General. And the manifest, indeed the avowed and admitted, ob-

risk of imposition of a fine of up to \$5,000 or of a jail term of five years, or of both. Moreover, it was the trial court's opinion that, if they went unchallenged, the various rate reductions would cause a decline in passenger income of at least 22-23 percent and in freight income of at least 20-25 percent to affected railroad companies. See *Perkins v. Northern Pacific Ry. Co.*, 155 Fed. 445, 449-456 (D. Minn. 1907).

<sup>100</sup>The Court also stated that:

[t]o await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. *Id.* at 165 (emphasis supplied).

<sup>101</sup>"A 'storm of controversy' raged in the wake of *Ex parte Young* \* \* \* *Steffel v. Thompson*, 415 U.S. 452, 465 (1973).

ject of seeking such relief was *to tie the hands* of the *State*, so that it could not in any manner or by any mode of proceeding, *in its own courts*, test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the Eleventh Amendment the suit brought in the Federal court was one, in legal effect, against the State \* \* \* 209 U.S. at 173-174.<sup>102</sup>

Because the decision in *Ex parte Young* is inherently faulty, the Court should overrule it, insofar as that may be necessary to apply the prohibition of the Eleventh Amendment to parties situated as those in this case. Alternatively, the Court should restate the rule of *Ex parte Young* so as to give effect to its purpose, while at the same time insuring that the Eleventh Amendment affords protection to a state situated as is Washington here.<sup>103</sup>

The decision in *Ex parte Young* was based on three factors: (1) an asserted violation by the defendant of rights guaranteed by the Fourteenth Amendment, (2) a potential prosecution for violation of the challenged law that was both publicly threatened and acknowledged to be imminent, and

<sup>102</sup>The decision has been criticized ever since for "false pretense," Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435, 437 (1962), and for "its own illogic," Wright, *Federal Courts* at 159 (1963). One scholar has concluded:

The decision in *Ex parte Young* rests on purest fiction. It is illogical. It is only doubtfully in accord with the prior decisions.

Wright, *Federal Courts* at 160.

See also Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 Hous. L. Rev. 1, 28 (1967).

<sup>103</sup>As Justice Brandeis stated:

[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407 (1932) (dissenting opinion) (footnote omitted).

(3) a certainty that the plaintiffs would suffer irreparable injury if the regulations were to be enforced and they were to challenge their constitutionality after enforcement. None of these are present here.<sup>104</sup>

In this case, compliance with the State statute would cause neither "irreparable" nor "both great and immediate" loss to ARCO during the period the statute's constitutionality would be challenged in State court. Nor would ARCO suffer irreparable loss by seeking relief in Washington State courts by bringing an action under the Uniform Declaratory Judgments Act, a course of action not open to the railroad companies in *Ex parte Young*.

*Ex parte Young*, as the Court recently explained, "permitted suits against state officials to obtain prospective relief against violations of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).<sup>105</sup>

<sup>104</sup>Nowhere is there evidence that State criminal prosecution of ARCO either has been threatened or is imminent. Indeed, Appellees have stipulated that they have been able to conform to the State statute. (A. 44.)

Nor is there here the "irreparable loss" or "irreparable damages" that must be present for a federal court to enjoin state officials from bringing criminal charges under a statute of questioned constitutionality. See *Younger v. Harris*, 401 U.S. 37, 43 (1970); *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926). Cf., *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Pearl Assurance Co., Ltd. v. Harrington*, 38 F. Supp. 411, 414 (D. Mass. 1941) (decision by Frankfurter, J.), citing favorably the rule declared by Holmes, J., in *Massachusetts State Grange v. Benton*, 272 U.S. 525, 527 (1926); Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 146 (1972).

<sup>105</sup>The Court has said that:

This holding has permitted the Civil War Amendments to the Constitution to serve as a sword rather than merely as a shield, for those whom they were designed to protect. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974).

See also Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 Harv. L. Rev. 682, n. 26 at 687 (1976).

The doctrine of *Ex parte Young* could continue under such a view to afford protection to those persons whose Fourteenth Amendment rights are being violated by state action, even if the Court were to accept Washington's argument here.

There is a need for the Court to deal with a line of decisions that are "unpredictable and \* \* \* enmeshed in legal casuistry." Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 155 (1972). A proper reformulation of *Ex parte Young* (or if necessary, an overruling of that case) and a reaffirmation of the Eleventh Amendment in cases such as this will mean clearer future standards and fewer dubious tests and distinctions.<sup>106</sup>

In summary, the State contends that it is protected here by the Eleventh Amendment; that the rule of *Ex parte Young*, to the extent that it denies that protection, should be overruled; and that, if not overruled, the rule of *Ex parte Young* should be properly defined and understood so as not to deny that protection. ARCO never argued that Chapter 125 violates any right guaranteed it by the Fourteenth Amendment (or by any other of the Civil War Amendments). The reason that the State here is protected by the Eleventh Amendment is that ARCO is not protected by the holding of *Ex parte Young*.

<sup>106</sup>One proposal that would remove the Court from a difficult position, give full effect to both the Amendment and the doctrine, and provide for fewer interpretive problems in the future is a recognition by the Court that the Fourteenth Amendment impliedly supplanted the Eleventh Amendment to the extent necessary to give citizens recourse against states in federal court actions seeking to vindicate Fourteenth Amendment rights.

## CONCLUSION

Based on the foregoing, Chapter 125 constitutes a valid exercise of the State of Washington's police powers to protect its highly valued inland marine waters. Neither the Ports and Waterways Safety Act nor any other federal statutory or federal constitutional provision precludes implementation of Chapter 125. Therefore the decision of the District Court should be reversed.

Furthermore, based on the jurisdictional limitations of federal courts contained in the Eleventh Amendment, the appellant State of Washington public officials, contrary to the ruling of the District Court, should be dismissed from this proceeding.

Respectfully submitted,

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# BRITISH COLUMBIA

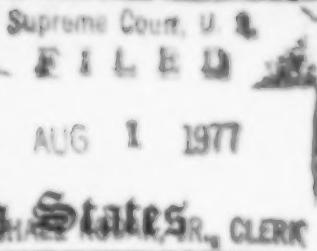


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IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 76-930

DIXY LEE RAY, Governor of the State of Washington,  
et al.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, et al.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

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IN THE  
**Supreme Court of The United States**

OCTOBER TERM, 1977

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No. 76-930

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DIXY LEE RAY, Governor of the State of Washington,  
et al.,

*Appellants.*

v.

ATLANTIC RICHFIELD COMPANY, et al.,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

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**BRIEF OF APPELLEES**

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**STATEMENT OF THE CASE**

**1. The Challenged State Statute**

At issue in this case is the constitutional validity of Washington's "Tanker Law," Chapter 125 of the 1975 Laws of the State of Washington, Revised Code of Washington ("R.C.W.") §§ 88.16.170 *et seq.*<sup>1</sup> The Tanker Law regulates the size, design and navigation of oil tankers engaged in interstate and international trade — an area long subject to the paramount regulation of the federal government — for the stated purpose of protecting the State's waters from the risk of oil spills. R.C.W. § 88.16.170. The Tanker Law has three operative provisions:

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<sup>1</sup> The Tanker Law is reproduced as Appendix I to Appellants' Jurisdictional Statement ("J.S."), at 30a-33a.

(1) Section 3(1) (the "Size Limit"), R.C.W. § 88.16.190(1), absolutely prohibits any oil tanker over 125,000 deadweight tons ("DWT") from entering Puget Sound.<sup>2</sup>

(2) Section 3(2) (the "Design Requirements"), R.C.W. § 88.16.190(2), prohibits any oil tanker between 40,000 DWT and 125,000 DWT from entering Puget Sound unless it has minimum shaft horsepower of one horsepower for each two and one-half DWT; twin screws; double bottoms underneath all cargo compartments; two radars, one of which must be collision-avoidance radar; and such other navigational systems as may be prescribed by the State Board of Pilotage Commissioners. A proviso to Section 3(2) (the "Tug Escort Proviso") waives compliance with the Design Requirements if the tanker is at all times under the escort of tugboats with an aggregate horsepower of five per cent of its deadweight tonnage.

(3) Section 2 (the "Pilotage Requirement"), R.C.W. § 88.16.180, provides that any oil tanker of 50,000 DWT or greater must employ a pilot licensed by the State of Washington while navigating Puget Sound.

Violation of the Tanker Law is a misdemeanor. R.C.W. § 88.16.150.

## 2. The Factual Background: The Tanker Law's Impact on Oil Transportation

Puget Sound is a large inlet of the Pacific Ocean which indents deep into western Washington. Roughly 120 miles long and up to 40 miles wide, this vast area of largely open water represents 65% of Washington

<sup>2</sup> Puget Sound is defined to include all waters east of a line between the Discovery Island light off Victoria, British Columbia, and the New Dungeness light east of Port Angeles on Washington's Olympic Peninsula. (See the navigation charts of record in the Appendix Attachment ("A.A.").)

waters and includes all the State's major ports, including Seattle and Tacoma. (A. 68, 73) The area thus blocked off by the Tanker Law is a major international waterway, sustaining extensive interstate and foreign commerce (A. 65), including that bound for Canadian ports in the Vancouver area. (A. 64) Included within Puget Sound — and thus barred to all tankers over 125,000 DWT — are all the State's refineries and oil docking or terminal facilities. (A. 47-48, 75).

Averaging over 200 feet in depth, Puget Sound is the deepest port area on the West Coast south of Alaska. (A. 50, 69; A.A.) There is at least 60 feet of water at all points along the route to Atlantic Richfield's Cherry Point refinery (A. 65), sufficient to accommodate tankers well in excess of the Tanker Law's Size Limit. Puget Sound's sheltered waters, wide and deep channels, and the Coast Guard's vessel traffic control system make it an excellent and safe port area.<sup>3</sup> Despite years of tanker operations in Puget Sound, there is no evidence that any tanker has ever had an oil spill during its transit of the Sound. (A. 80, 121-22).<sup>4</sup>

The Tanker Law impermissibly imposes local regulation upon what the three-judge court below correctly described as "this most interstate, even international, of transportation systems." (J.S. at 8a). The United

<sup>3</sup> Although occasionally subject to adverse weather, visibility in Puget Sound is less than one mile only 2% of the time and exceeds seven miles over 90% of the time. (Pre-trial Order Ex. I). Winds average only 6.7 miles per hour and exceed 18 miles an hour less than 3% of the time. (Ex. J).

<sup>4</sup> The one oil spill mentioned in the record — of 476 barrels — took place at dockside. (A. 84, 121-22). According to the "best information available" the only tanker casualties in Puget Sound — none of which was shown to involve an oil spill — involved vessels too small to be covered by the Tanker Law. (A. 121-22). Appellants cite Pre-trial Order Exhibit P as purported evidence of oil spills by tankers in transit. Brief of Appellants ("B.A.") at 16. No Exhibit P was ever submitted into the record.

States in 1975 imported over 35% of its oil requirements. (A. 57)<sup>5</sup> More than 80% of this imported oil is brought into this country by tanker (*Ibid.*). The vast majority of these vessels — carrying 94% of U.S. tanker oil imports — are registered in and fly the flags of foreign nations. (A. 58).

Approximately two-thirds of the crude oil requirements of Atlantic Richfield's Cherry Point refinery are supplied by tanker deliveries from foreign sources (A. 45). All fifteen of the tankers over 125,000 DWT which called at Cherry Point prior to the Tanker Law's Size Limit, and most of the tankers between 40,000 and 125,000 DWT, were sailing under foreign registry. (A. 107-13). The Tanker Law applies to all such tankers regardless of the national flag they fly (A. 44).

Tankers over 125,000 DWT are now in general use throughout the world because of the significant transportation cost savings they provide — up to 50% on longer runs (A. 63-64). At the end of 1975 there were 727 tankers over 125,000 DWT in use, representing 59% of the world's total tanker capacity, and an additional 344 such vessels under construction (A. 58). All but four of the existing tankers over 125,000 DWT fly foreign flags. (*Id.*) The Size Limit permanently excludes all of these vessels from Puget Sound, regardless of the amount of oil they actually carry on any given voyage.<sup>6</sup> Atlantic Richfield would now be using tankers over 125,000 DWT to serve its Cherry Point refinery but for the Tanker Law's embargo (A. 46, 364-68).

In addition to receiving tankers engaged in foreign trade, Puget Sound ports will soon play a significant role in the transportation of oil from the North Slope of

<sup>5</sup> Oil imports have more recently approximated 50% of U.S. requirements. 123 Cong. Rec. S.8594 (daily ed. May 25, 1977).

<sup>6</sup> Deadweight tonnage is defined for purposes of the Tanker Law in terms of the cargo carrying capacity of the vessel. (A. 43)

Alaska to the lower 48 states. Oil has begun to flow through the Trans-Alaska Pipeline as this brief is being written, and is expected to reach its capacity of 2,200,000 barrels of oil per day by 1981 (A. 49). It is currently anticipated that all of this oil will be transported by U.S. flag tankers to ports on the West Coast, with approximately 15% destined for the Puget Sound area (A. 49, 88). Atlantic Richfield's Cherry Point refinery was specifically designed and built to refine North Slope crude oil (A. 45).

Plans to transport this oil to the lower 48 states rely substantially on the use of tankers over 125,000 DWT. Docking facilities at Valdez, Alaska, at the southern terminus of the Trans-Alaska Pipeline, have a depth of at least 75 feet of water, and are designed to accommodate fully loaded tankers of up to 250,000 DWT (A. 49). One-third of the tankers to be employed in the Alaska trade — and a larger percentage of the total tanker capacity — will be in excess of 125,000 DWT (A. 50). In addition to Puget Sound, the Port of Long Beach, California — which can also accommodate fully loaded tankers over 125,000 DWT (A. 52), and plans to expand this capacity (A. 50) — is expected to receive a substantial percentage of North Slope crude. (A. 49). Atlantic Richfield utilizes tankers over 125,000 DWT at Long Beach to serve its Carson, California refinery. (A. 52, 115).<sup>7</sup>

Atlantic Richfield at the time of trial had five large new tankers under construction, at a cost of over \$250 million (A. 53-54). Two U.S. flag tankers of approximately 150,000 DWT under construction in San Diego are in-

<sup>7</sup> Although most East and Gulf Coast ports are too shallow to permit entry of fully loaded tankers over 125,000 DWT, Atlantic Richfield has received the necessary governmental approvals to go forward with its plans to modify the docking facilities at its Philadelphia refinery to accommodate lightered (i.e., partially off-loaded) tankers up to and including 150,000 DWT, and has similar plans to modify the docking facilities serving its Houston refinery (A. 52).

tended for use in transporting North Slope oil to West Coast ports, including Puget Sound (A. 53). Three foreign flag tankers — two of approximately 150,000 DWT and one of 120,000 DWT — intended for use in delivering foreign crude oil to Atlantic Richfield's U.S. refineries were then under construction and scheduled for completion this year. (A. 54).<sup>8</sup>

At present, Atlantic Richfield is the only refiner in the Puget Sound area with docking facilities capable of accommodating fully loaded tankers over 125,000 DWT (A. 46-48). Prior to the passage of the Tanker Law, however, both Mobil and Shell had announced planned extensions of their docking facilities into deeper waters to accommodate fully loaded tankers of 150,000 DWT and 200,000 DWT, respectively (A. 47-48). Shell has two U.S. flag tankers of 188,000 DWT under construction, intended for use in the Alaska trade (A. 54). Mobil, Shell and Texaco all own a substantial number of foreign flag tankers in excess of 125,000 DWT which, absent the Tanker Law and with modification of docking facilities, could be used to bring foreign crude oil to their Puget Sound refineries (A. 53).<sup>9</sup>

No tanker in the world meets all the Tanker Law's Design Requirements (A. 66), and it is not economically

<sup>8</sup> Atlantic Richfield has in fact taken delivery of the three tankers previously under construction in Japan — the "ARCO Independence", "ARCO Discovery" and "ARCO Mariner" — and, due to a change in contractual arrangements, all three are approximately 150,000 DWT. These vessels, registered in Liberia, are now being used to bring foreign crude to Long Beach and would be used to serve Cherry Point were it not for the Tanker Law. (See A. 368).

<sup>9</sup> Appellee Seatrain Lines, a shipping and shipbuilding firm, owns or operates twelve tankers, four of which are foreign flag tankers over 125,000 DWT which are excluded from Puget Sound by the Tanker Law's Size Limit. (A. 53) Seatrain has constructed two 225,000 DWT tankers with the aid of U.S. Maritime Administration subsidies (A. 58-60), and has two other subsidized 225,000 DWT tankers under construction at a cost of \$175 million. (A. 54-55, 61-62).

feasible to retrofit an existing tanker to meet these requirements. (A. 67). The cost of compliance with the Design Requirements for a new tanker is immense — double bottoms and twin screws alone would add roughly \$8.8 million to the cost of a 150,000 DWT vessel. (A. 54, 62) More fundamentally, flexibility in deployment of tankers is essential (A. 62-63), and it is not realistically possible to commit the enormous capital investment involved in new tanker construction (A. 54, 61-62) to meet the particular design requirements of a single port when other states or localities may impose additional or different requirements. As a result, each of the tankers calling at Cherry Point since the effective date of the Tanker Law has been required to pay the penalty it exacts for non-compliance with its Design Requirements — to employ a fleet of tugboats to escort the tanker to Cherry Point through 45 miles of largely open water. (A. 44, 46, 64, 67; A.A.).

Washington's Tanker Law cannot stand in the face of the clear need for uniform national regulation of tanker design and navigation recognized by Congress in the Ports and Waterways Safety Act ("PWSA"). As the amicus briefs filed in this case on behalf of 16 states attest, many other states are likewise concerned about the environmental impact of increased tanker traffic resulting from both the opening of the Trans-Alaska Pipeline and increasing U.S. oil imports, and are likely to enact comparable legislation if the Tanker Law is upheld. (See generally A. 95-96, Pre-trial Order ¶ 153).<sup>10</sup> This risk of proliferating state and local tanker regulation is real, not hypothetical. Already, Alaska has enacted its own tanker law, Chapter 266, 1976 Laws; Alaska Stat. § 30.20.010 *et seq.* (Supp. 1976), which prescribes a different and inconsistent set of design requirements and

<sup>10</sup> The bulk of paragraph 153 and the remainder of the Pre-trial Order were inadvertently omitted from the Appendix in printing.

encourages rather than prohibits use of tankers over 125,000 DWT.

### 3. Proceedings Below

Atlantic Richfield filed this lawsuit on September 8, 1975, the day the Tanker Law went into effect. Atlantic Richfield's complaint alleged that the Tanker Law was preempted by the Ports and Waterways Safety Act; conflicted with the PWSA and various other federal statutes; and unconstitutionally burdened interstate commerce and interfered with federal regulation of foreign affairs. Named as defendants were Washington Governor Daniel J. Evans and other state and local officials responsible for enforcement of the Tanker Law.<sup>11</sup> Because substantial issues under the Commerce Clause and foreign affairs provisions of the Constitution were raised by the complaint, a three-judge court was convened.

The case was briefed and argued before the three-judge court on June 25, 1976, on the basis of a detailed stipulation of facts embodied in a Pre-Trial Order filed April 6, 1976 (A. 39-359). The court also had before it briefs filed by the United States as *amicus curiae* in support of its contention that the Tanker Law was preempted in its entirety by the PWSA.

The three-judge court issued its opinion and order holding the Tanker Law invalid on September 24, 1976. The court held that Sections 3(1) and 3(2) of the Tanker Law — the Size Limit, Design Requirements and Tug Escort Proviso — were preempted by the comprehensive and exclusive federal scheme established by the PWSA for regulating the navigation and design of tankers.

<sup>11</sup> Seatrain Lines, Inc., intervened as a plaintiff and joins with Atlantic Richfield in this brief. Four environmental organizations and the King County (Seattle) Prosecuting Attorney intervened as defendants.

J.S. at 7a-8a.<sup>12</sup> The three-judge court further held that Section 2 of the Tanker Law, the Pilotage Requirement, was invalid as applied to tankers engaged in the "coastwise" (domestic) trade because it conflicts with 46 U.S.C. §§ 215, 364. J.S. at 9a.<sup>13</sup> The court, relying on *Ex parte Young*, 209 U.S. 123 (1908), also denied the motion of the defendant State officials to dismiss the complaint on Eleventh Amendment grounds. J.S. at 6a.

The three-judge court initially declined to enter injunctive relief on the presumption that the defendant State officials would respect a declaratory judgment. *Id.* at 12a. As soon as it became apparent that the defendants intended to continue enforcement of the statute notwithstanding the court's ruling, Atlantic Richfield moved for supplementary injunctive relief. After a hearing on November 12, 1976, the three-judge court issued an order enjoining enforcement of the Tanker Law. J.S. at 4a. The injunction was stayed by Mr. Justice Rehnquist, 429 U.S. 1334 (December 9, 1976), and then by the Court on January 10, 1977, pending final disposition of this appeal.

<sup>12</sup> The three-judge court found it unnecessary to address the other issues raised by Atlantic Richfield in its challenge to Sections 3(1) and 3(2) of the Tanker Law. J.S. at 12a.

<sup>13</sup> Appellants now concede the invalidity of the Pilotage Requirement as applied to enrolled vessels engaged in coastwise trade. B.A. at 10 n.9. Atlantic Richfield has never contended that state pilotage requirements are invalid as applied to registered vessels (i.e., engaged in foreign trade). See 46 U.S.C. §§ 211, 215; PWSA § 101(5). There is thus no dispute of substance between the parties on this point.

The question remains as to the proper disposition of this appeal insofar as it concerns Section 2 of the Tanker Law. Washington law elsewhere requires state-licensed pilots on all vessels, R.C.W. § 88.16.070, but this provision exempts enrolled vessels, as required by federal law. The only effect of Section 2 of the Tanker Law, as is plain on its face, was to remove this exemption for enrolled tankers of 50,000 DWT or more. The three-judge court was thus correct to enjoin enforcement of Section 2 in its entirety and its judgment should be affirmed in this respect. Not surprisingly, appellants did not raise any issue as to the propriety of the three-judge court's action on this point in their Jurisdictional Statement.

The Court noted probable jurisdiction on February 28, 1977.

#### QUESTIONS PRESENTED

1. Was the three-judge court correct in holding that Sections 3(1) and 3(2) of Washington's Tanker Law are invalid under the Supremacy Clause because they seek to regulate an area preempted by federal law, particularly the Ports and Waterways Safety Act?
2. Even if not preempted, is the Tanker Law invalid under the Supremacy Clause because it conflicts with the PWSA and its implementation by the Coast Guard; with the federal vessel registration, enrollment and licensing laws; and with the Maritime Administration's Tanker Construction Program?
3. Is the Tanker Law invalid under the Commerce Clause because it invades a field where uniform federal regulation is essential?
4. Is the Tanker Law invalid under the constitutional treaty-making and foreign affairs powers because uniform federal control of foreign policy and treaty negotiation is required?
5. Should *Ex parte Young*, 209 U.S. 123 (1908), be overruled?

#### SUMMARY OF ARGUMENT

Washington's Tanker Law is a giant step toward Balkanization of regulatory authority over seagoing oil transportation. Congress enacted the Ports and Waterways Safety Act of 1972 to ensure stringent federal regulation of oil tankers to prevent marine pollution. In so doing, Congress recognized the compelling need for uniform regulation of tanker size, design and navigation, and acted to preempt state regulation such as the Tanker Law.

The two overlapping titles of the PWSA authorize comprehensive Coast Guard regulation of vessel traffic and navigational controls as well as tanker design and equipment. The Coast Guard has fully implemented this authority, attacking its oil spill prevention responsibilities from all angles. Coast Guard regulations establish a vessel traffic control system in Puget Sound, which includes restrictions on large tankers but permits their passage, and impose selective tug escort requirements, thereby effectively rejecting the Tanker Law's Size Limit and Tug Escort Proviso. The Coast Guard has also established comprehensive regulations covering the design and equipment of tankers for protection of the environment, and in so doing has rejected each of the particular Design Requirements of the Tanker Law.

Examination of the PWSA, its legislative history and economic context can leave no reasonable doubt that Congress intended to preempt state regulation. Section 102(b) of the Act explicitly provides that Title I permits state regulation "for structures only" and was intended to "make it absolutely clear . . . that State regulation of vessels is not contemplated." Title II merely amended the existing scheme of "uniform" regulation of tanker design and equipment to expand its purposes to include protection of the environment as well as vessel safety. Congress was concerned about the international consequences of unilateral tanker regulation by the United States in light of ongoing negotiations to achieve international standards of tanker design, and could not possibly have intended to allow each of the states to establish its own standards. Any state regulation in this area necessarily interferes with the Coast Guard's balancing of environmental considerations against concern for safety, cost, effectiveness, and maintenance of the flow of commercial traffic.

The Tanker Law's Size Limit is invalid whether viewed as a form of vessel traffic regulation or as a

tanker design requirement. The Law's combination of Design Requirements and Tug Escort Proviso is an invalid attempt to regulate tanker design by penalizing or burdening noncompliance with the state-prescribed design features. Even if viewed in isolation, the Tug Escort Proviso is preempted by the PWSA and Coast Guard regulatory actions in the tug escort area.

In addition to the preemption holding relied upon by the three-judge court, its judgment should be affirmed on any of several alternative grounds: The Tanker Law conflicts with the PWSA as it has been implemented by the Coast Guard, and with the rights granted by the permits and certifications held by tankers under the Tank Vessel Act as amended by the PWSA. The Size Limit conflicts with the rights granted by the federal vessel registration, enrollment and licensing laws which prohibit a state from excluding a licensed vessel from its waters, and with the Merchant Marine Act of 1970 under which the Maritime Administration has spent hundreds of millions of dollars to subsidize construction of the large tankers Washington seeks to exclude. The Tanker Law is invalid under the Commerce Clause because of the need for uniformity in regulation of tanker design and equipment, and interferes with the exclusive federal foreign affairs powers by jeopardizing continuing efforts to reach international agreement on tanker design standards.

#### ARGUMENT

##### I. THE PORTS AND WATERWAYS SAFETY ACT PREEMPTS STATE REGULATION OF TANKER SIZE, DESIGN AND NAVIGATION FOR PROTECTION OF THE MARINE ENVIRONMENT

###### A. The Coast Guard is Actively and Fully Regulating the Field of Tanker Size, Design and Navigation

##### Under the Ports and Waterways Safety Act and Has Dealt with Each Feature of the Tanker Law

The Ports and Waterways Safety Act was enacted in 1972, Pub. L. No. 92-340, 86 Stat. 424, to establish a comprehensive scheme of federal regulation of tanker design, construction and operation to prevent oil spills. See S. Rep. No. 92-724, 92nd Cong., 2d Sess. (1972) (hereinafter the "Senate Report"), at 7-10. Like the Washington legislature, Congress was concerned about the environmental implications of increased tanker traffic and the increasing size of modern oil tankers. *Id.* at 12-13. The PWSA and Coast Guard regulations promulgated thereunder fully regulate the field of tanker size, design and movement, the subjects of Washington's Tanker Law. Indeed, the Coast Guard has dealt with each of the features of the Tanker Law, and in large part rejected them, in the exercise of its regulatory authority under the PWSA.

The PWSA has two titles, representing two overlapping approaches to protection of the marine environment. Title I deals primarily with vessel traffic controls, while Title II focuses on tanker design.

Title I of the PWSA, now codified at 33 U.S.C. §§ 1221 *et seq.*, authorizes the Coast Guard to establish vessel traffic control systems, PWSA § 101(1), 33 U.S.C. § 1221(1); to prescribe navigational equipment, PWSA § 101(2), 33 U.S.C. § 1221(2); to establish tanker size limitations or operating conditions, PWSA § 101(3)(iii), 33 U.S.C. § 1221(3)(iii); and to restrict operation of tankers not having particular operating capabilities. PWSA § 101(3)(iv), 33 U.S.C. § 1221(3)(iv).

Title II of the PWSA amended the Tank Vessel Act, 46 U.S.C. § 391a, to authorize the Coast Guard to adopt uniform federal regulations for the design, construction, equipment and operation of tankers. PWSA § 201(3), 46 U.S.C. § 391a(3); see Senate Report at 7. Congress

specifically directed the Coast Guard to adopt design and construction standards to improve tanker maneuvering and stopping ability, to reduce the possibility of collisions or groundings, and to limit cargo loss in the event of an accident. PWSA § 201(7), 46 U.S.C. § 391a(7).

The Coast Guard has fully implemented its regulatory powers under Title I in Puget Sound. The Coast Guard has established a mandatory vessel traffic control system ("VTS") in Puget Sound. 39 Fed. Reg. 25430 (July 10, 1974), 33 C.F.R. Part 161 Subpart B (1976), as amended, 42 Fed. Reg. 29480 (June 9, 1977). (See A. 65, 155-198.) The VTS establishes a network of one-way traffic lanes throughout Puget Sound, each 1000 yards wide and separated by zones 500 yards wide, which are plainly marked on the navigation charts in the Appendix. (A.A.) In Rosario Strait — the only confined portion of the route to Atlantic Richfield's Cherry Point refinery — a single traffic lane has been established, and the Coast Guard prohibits the passage of more than one tanker over 70,000 DWT in either direction at any given time, a size limitation which is reduced to 40,000 DWT in adverse weather (A. 65). The VTS requires use of radio-telephone equipment to maintain continuous vessel communications contact with the Coast Guard's Vessel Traffic Center in Seattle, and regular reporting of the vessel's position, speed, and other pertinent data. The regulations also authorize the Vessel Traffic Center to assume direct control of vessel movement if necessary during periods of adverse weather or congestion, an authority the Coast Guard anticipates will be exercised "primarily in harbor areas and in and around Rosario Strait." 38 Fed. Reg. 21228, 21229 (Aug. 6, 1973).<sup>14</sup>

<sup>14</sup> The Coast Guard recently established the Prince William Sound VTS to serve Valdez, Alaska. 42 Fed. Reg. 37928 (July 25, 1977). Vessel traffic systems are also in place in San Francisco, Houston/Galveston, Louisville and portions of the Gulf Inter-coastal Waterway, and are under development in New York and New Orleans. See *Hearings on Vessel Traffic Control before*

Coast Guard regulations under Title I also empower its local District Commanders and Captains of the Port to exercise authority under PWSA § 101(3), including the power to exclude tankers over a given size or to condition tanker operations on use of tug escorts if the Coast Guard officers determine that weather conditions, vessel traffic congestion or other circumstances make such restrictions necessary for safe operation. 40 Fed. Reg. 6653 (Feb. 13, 1975), 33 C.F.R. Part 160. The Puget Sound Captain of the Port is in fact exercising this authority, and has imposed tug escort requirements in Rosario Strait on LPG (liquefied petroleum gas) tankers and at least one other vessel. (See the Appendix to this brief at pp. A-3, 8, 11-12 *infra*.)

Coast Guard adoption of generally applicable standards of tug assistance for tankers operating in confined waters is under active consideration, Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976), and will be the subject of a rulemaking proceeding in the near future. 42 Fed. Reg. 5956, 5958 (Jan. 31, 1977).<sup>15</sup>

The Coast Guard has also fully exercised its authority under the PWSA to prescribe tanker design and equipment requirements. The Coast Guard earlier this year promulgated navigational safety regulations under Title I which require all tankers to have radar, magnetic compass, gyrocompass, depth sounding devices and other prescribed navigational equipment. 42 Fed. Reg. 5956 (Jan. 31, 1977), 33 C.F.R. Part 164.<sup>16</sup> At the same time

*the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 94th Cong., 2d Sess., Ser. No. 94-39 (1976) (hereinafter "Vessel Traffic Control Hearings"), at 189-92.

<sup>15</sup> Proposed requirements for minimum underkeel clearance are also under consideration. *Id.* at 5957; see Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18771 (May 6, 1976).

<sup>16</sup> These navigation safety regulations also require tankers to have the latest available navigational charts and publications; to post the vessel's maneuvering and stopping capabilities; to test

the Coast Guard issued proposed regulations to add LORAN-C radio-navigation systems to the list of required equipment. Notice of Proposed Rulemaking, 42 Fed. Reg. 5966 (Jan. 31, 1977).<sup>17</sup>

Coast Guard regulations under Title II establish tanker design standards for U.S. and foreign flag vessels. 40 Fed. Reg. 48280 (Oct. 14, 1975), 41 Fed. Reg. 1479 (Jan. 8, 1976), and 41 Fed. Reg. 54177 (Dec. 13, 1976), 33 C.F.R. Part 157. The regulations are based largely on the provisions of the International Convention for the Prevention of Pollution from Ships, adopted in 1973 by the Inter-Governmental Maritime Consultative Organization ("IMCO"), the maritime arm of the United Nations, and currently awaiting ratification by member nations. The regulations require new tankers over 70,000 DWT to have segregated ballast tanks, carrying only water, which must be so located as to provide protection against oil spillage in the event of accident. They also impose limitations on cargo tank arrangement and size, and establish structural subdivision and damage stability requirements intended to reduce oil loss in the event of accident.

During the course of its development and promulgation of these regulations, the Coast Guard considered and expressly rejected requirements for double bottoms, twin screws, extraordinary horsepower, and a second radar with collision-avoidance capability — all the Design Requirements of the Tanker Law. As discussed in detail below, these Design Requirements were rejected for a variety of reasons, including doubts as to their efficacy and the need for uniform international design standards.

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steering, communications and propulsion systems within 12 hours before entering or getting underway in U.S. waters; and to follow prescribed navigation rules.

<sup>17</sup> The Coast Guard has also indicated that an offshore tanker routing system between Valdez and West Coast ports, utilizing such long range navigation equipment, is under development. *Vessel Traffic Control Hearings* at 192.

*See United States Coast Guard, Final Environmental Impact Statement, Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade (Aug. 15, 1975) (A. 207-333) (hereinafter "Coast Guard EIS"), at A. 215-21, 277-310.*

Renewed concern over tanker safety has spawned a second wave of Coast Guard rulemaking proceedings. The Coast Guard has published proposed regulations to carry out the initiatives recommended by President Carter in his message to Congress on tanker pollution control. *See* 13 Weekly Comp. of Pres. Docs. 408 (Mar. 18, 1977). These proposed regulations would require new tankers over 20,000 DWT, delivered in 1982 or later, to have segregated ballast tanks and double bottoms, and existing tankers over 20,000 DWT to be retrofitted with segregated ballast tanks by 1982. 42 Fed. Reg. 24868 (May 16, 1977). The proposed regulations would also require tankers over 10,000 DWT to have a second radar system with collision-avoidance capability. 42 Fed. Reg. at 24871.<sup>18</sup>

#### **B. The PWSA and Its Legislative History Establish Congressional Intent to Preempt State Regulation**

Where Congress has intended its regulation of an aspect of commerce to be exclusive, state regulation is invalid under the Supremacy Clause, even though the state law might be said to complement the purposes of federal law. *Jones v. Rath Packing Co.*, 45 U.S.L.W.

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<sup>18</sup> The proposed regulations also extend requirements for inert gas systems to prevent tanker explosions, which requirements are currently imposed on tankers over 100,000 DWT, 41 Fed. Reg. 3843 (Jan. 26, 1976), 46 C.F.R. Part 32.53 (1976), to all tankers over 20,000 DWT, 42 Fed. Reg. at 24874, and require improved tanker emergency steering standards, *id.* at 24869. The Coast Guard has also recently proposed regulations to upgrade tanker personnel qualifications. 42 Fed. Reg. 21190 (Apr. 25, 1977).

4323, 4324-25 (U.S. Mar. 29, 1977); *Campbell v. Hussey*, 368 U.S. 297, 302 (1961); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956). Congressional intent to preempt state regulation may be explicit in the statute or its legislative history, or may be implied from the nature of the subject matter, the need for uniform national regulation, the dominance of the federal interest at stake, or the pervasiveness of the federal regulatory scheme. *Jones v. Rath Packing Co.*, *supra*; *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146-47 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

Examination of the PWSA, its legislative history and economic context can leave no reasonable doubt that Congress intended to occupy the field and preempt state regulation of oil tanker size, design and navigation for the purpose of protecting the marine environment. Together, the two titles of the PWSA establish a "systems approach" intended "to deal with the *total* tanker oil pollution problem." Senate Report at 14 (emphasis added).

#### **1. Section 102(b) of the PWSA Expressly Preempts State Regulation of Vessels**

Section 102(b) of the PWSA, 33 U.S.C. § 1222(b), was expressly intended to make "absolutely clear" congressional intent to preempt state regulation of vessels. H.R. Rep. No. 92-563, 92d Cong., 1st Sess. (1971) (hereinafter "House Report"), at 15. Section 102(b) provides that Title I does not "prevent a State or political subdivision thereof from prescribing *for structures only* higher safety equipment requirements or safety standards." (Emphasis added.)

During hearings on the bill as originally introduced in 1970, Congressman Downing expressed concern that "each of the coastal States [might impose] different

types of regulations and requirements so that an incoming vessel would be in a state of confusion." *Hearings on Port and Harbor Safety before the Subcommittee on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Committee on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., Ser. No. 91-34 (1970) (hereinafter "1970 House Hearings"), at 27-28. Coast Guard witnesses presenting the proposed legislation responded that it was not intended to permit the states to impose such differing standards on vessels, and agreed that the bill should be amended to make that intention clear. *Id.* at 28. See also *id.* at 301 (bill to be redrafted "to make crystal clear that this [state authority in § 102(b)] was to apply to land and not to vessels at all").

Moreover, the Chairman of the National Transportation Safety Board — whose recommendations played a major role in development of Title I, Senate Report at 13 — urged adoption of uniform federal regulation of vessels because state regulation "could result in a patchwork quilt approach which would lack standard frequencies and equipment and would place a greater burden upon ships than a federally-regulated program. . . [A] federally-controlled program would minimize the variety of requirements both foreign and domestic shipping would have to meet." *Hearings on Port and Harbor Safety before the Subcommittee on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., Ser. No. 92-12 (1971) (hereinafter "1971 House Hearings"), at 348-49. See also *1971 House Hearings* at 377 (Statement of Appellant Sierra Club urging "[n]ational, uniform Federal action"); *id.* at 141, 170-72, 186.

Indeed, during the committee hearings several congressmen specifically mentioned the need to preempt state regulation of vessels so as to prevent a state from im-

posing an absolute limitation on the size of tankers permitted to operate in its waters, as Washington has attempted to do here. For example, Congressman Keith declared that state laws “banning giant tankers” should not be permitted, saying that “[w]e do not want the States to resort to individual actions that adversely affect our national interest.” *Id.* at 30. Congressman Tiernan agreed, adding that such a size limit would require “more vessels in carrying the fuels we need for our demands in keeping the economy going.” *Id.* at 32. See also *id.* at 172; *Hearings on the Navigable Waters Safety and Environmental Quality Act Before the Senate Committee on Commerce*, 92d Cong., 1st Sess., Ser. No. 92-39 (1971) (hereinafter, “Senate Hearings”), at 81 (Statement of Senator Inouye); Senate Report at 33.

The House Committee Report explains that it was amending Section 102(b) to make explicit congressional intent to preempt state regulation of vessels:

“This amendment was suggested since it was felt that H.R. 8140 does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. *The inserted language is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated.*” House Report at 15 (emphasis added).<sup>19</sup>

<sup>19</sup> The Committee report goes on to explain:

“Last year in the hearings on H.R. 17830, Subcommittee Counsel asked the Coast Guard [Chief] Counsel whether it was the intention of the Coast Guard that States should prescribe safety equipment standards for vessels. The Coast Guard witness said that it was their intention that *higher vessel equipment regulations and standards by States should apply to structures only and not to vessels*. He agreed that the language of H.R. 17830 was not clear in this regard and that we should put some clarifying language in the section.

“Your Committee adopted the suggested language since it will make clear the intent mentioned above.” House Report at 15 (emphasis added).

It is difficult to imagine a more forceful statement of congressional intent to preempt state regulation of tankers, including state-imposed size limitations. The Coast Guard has fully exercised its regulatory authority under Title I and has, in particular, established a comprehensive vessel traffic control system for Puget Sound. There is not the slightest indication that Congress intended subsequent state regulation like Washington’s Tanker Law to stand in the face of such extensive Coast Guard regulation. On the contrary, the House Committee Report declared that “one of the strong points of the legislation is the imposition of federal control in the areas envisioned by the bill which will insure regulatory and enforcement uniformity throughout all the covered areas.” House Report at 8.<sup>20</sup>

The sole continuing state authority over vessel movement recognized by Congress in the PWSA was state regulation of pilotage on vessels in foreign trade, PWSA § 101(5), a historical anomaly dating back to the First Congress, 1 Stat. 54 (1789); *see Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1851). Otherwise, the only role carved out by Congress for state and local authorities in the regulation of vessels is the right to be consulted and comment upon proposed *federal* regulations. PWSA § 104.<sup>21</sup>

<sup>20</sup> In light of the PWSA’s legislative history, the recent remarks of Senator Magnuson of Washington attacking the decision of the court below are entitled to no weight. As the Court recently observed, “post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act’s passage.” *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

<sup>21</sup> Appellants argue that Title I leaves room for state action because Congress limited the Coast Guard’s power to control vessel traffic to hazardous or congested areas. B.A. at 44-46. However, this “limitation” simply reflects congressional intent that the Coast Guard, unlike an air traffic controller, should not assume direct control of vessel traffic in all circumstances. Senate Report at 32; House Report at 8-9. The principal purpose behind this limitation of Coast Guard authority was to

## 2. Congressional Intent to Preempt State Regulation Is Manifest in Title II and its Legislative History

The congressional intent to preempt state tanker regulation in Title I is reinforced in Title II of the PWSA and its legislative history. As the court below held, J.S. at 8a, the purpose of Title II was to establish uniform federal regulations governing the design, construction and operation of tankers for the protection of the marine environment.

The necessity for uniform federal regulation of maritime affairs has been recognized since the nation's founding. *See generally* Constitution Art. III, § 2, cl. 1; *The Lottawanna*, 88 U.S. 558, 575 (1875); *Gibbons v. Ogden*, 22 U.S. 1, 190 (1824). The need for national uniformity is nowhere more compelling than with regard to the design, construction and operation of the vessels of interstate and foreign trade themselves. *See Kelly v. Washington*, 302 U.S. 1, 14-15 (1937), quoted at p. 58 *infra*. In response to this need for uniform regulation, Congress, starting with the first vessel inspection laws, 5 Stat. 304 (1838), and continuing to the present, has established a comprehensive scheme of federal regulation of vessel design, construction and operation. 46 U.S.C. §§ 361 *et seq.* The basic features of this scheme include required compliance with extensive Coast Guard regulations relating to ship design, construction and equipment, *see generally* Title 46 C.F.R.; Coast Guard approval

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preserve some of the traditional independence and authority of vessel masters and pilots. House Report at 9. There is no evidence that Congress intended to leave the door open for the states to impose even greater intrusions on these traditional responsibilities.

In any event, the Puget Sound VTS was established upon the Coast Guard's determination that the area "is subject to congested vessel traffic and hazardous weather conditions." 38 Fed. Reg. at 21228. Appellants cannot seriously contend that the Coast Guard lacks authority under Title I to control vessel traffic in Puget Sound.

of construction plans for all new vessels, 46 C.F.R. §§ 2.90-1, 31.10-5; regular and complete Coast Guard vessel inspection, 46 U.S.C. §§ 391(b), 392(e); and issuance of required permits and certificates upon Coast Guard approval, 46 U.S.C. § 399. *See generally* Gilmore & Black, *The Law of Admiralty* 986-87 (2d ed. 1975). There can be little doubt that this complex regulatory scheme preempts state laws within the proper scope of its regulation. *Kelly v. Washington*, *supra*, at 4; *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444-45 (1960); compare *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

In 1936, Congress made oil tankers subject to this comprehensive regulatory scheme with passage of the Tank Vessel Act, 49 Stat. 1889, 46 U.S.C. § 391a. Section 2 of the 1936 Act granted the Coast Guard authority to promulgate regulations establishing standards of tanker design, construction, equipment and operation, *see* 46 C.F.R. Subchapter D, in terms almost identical to those of Section 201(3) of the PWSA, but principally for the purpose of protecting "life and property." *See* Senate Report at 21.

The purpose of the original Tank Vessel Act was to establish "a reasonable and uniform set of rules and regulations concerning ship construction, equipping, [and] operation . . ." H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936). Congress found this legislation necessary to correct a situation where some vessels were subject to "more stringent" regulations than others, "whereas it was the intention to have uniform application." *Ibid.* *See also Hearings on H.R. 12840 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 3-5 (1936).

Title II of the PWSA merely amended the Tank Vessel Act to add express Coast Guard authority to adopt such uniform regulations for the purpose of protection of the

marine environment as well as for vessel safety. Senate Report at 26. In so doing, Congress did not indicate any intention to change the preemptive effect of the Tank Vessel Act. *Compare Jones v. Rath Packing Co.*, *supra*, at 4328. On the contrary, the legislative history of Title II emphasizes that the statute was intended to establish a "comprehensive" scheme of federal regulation. Senate Report at 7-10, 13, 20-22, 29.<sup>22</sup>

Title II's directive to the Coast Guard to establish "comprehensive minimum standards" of tanker design and construction does not indicate any intent to allow state regulation in this area. Use of the word "minimum" merely signifies congressional intent to leave the nuts and bolts of ship construction where they have always been, with the ship owner or shipbuilder, subject to compliance with Coast Guard regulations. In this sense, all of the Coast Guard's detailed regulations on vessel construction for purposes of vessel safety under the federal inspection laws and the original Tank Vessel Act are likewise "minimum standards." Congress has repeatedly used the term "minimum standards" in just this sense in other laws where, as here, preemption was intended.<sup>23</sup> See, e.g., Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671 *et seq.*; *Tenneco, Inc. v. Public Service Comm'n*, 489 F.2d

<sup>22</sup> Significantly, when concern subsequently arose over the safety of the tankers to be employed in carrying North Slope oil to West Coast ports, Congress responded by advancing to June 30, 1974, the deadline, contained in Section 7(C) of Title II, 46 U.S.C. § 391a(7)(C), for the adoption *by the Coast Guard* of regulations for tankers in domestic trade, Trans-Alaska Pipeline Authorization Act § 401, Pub. L. No. 93-153, 87 Stat. 589 (1973), rather than authorizing state regulation of tanker size, design or operation. See 119 Cong. Rec. 22836-39 (1973).

<sup>23</sup> The Court in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1953), did not state that use of the term "minimum standards" was "strong evidence" of congressional intent to allow state regulation, as appellants claim. B.A. at 36 n.41. The Court in *Florida Lime* merely recognized that use of such terminology "cannot be said, without more, to reveal a design that federal marketing orders should displace all state regulations." 373 U.S. at 147-48.

334, 336 (4th Cir. 1973), *cert. denied*, 417 U.S. 946 (1974); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 *et seq.* Indeed, the court below used the term "minimum design specifications" in this sense in describing the Tanker Law. J.S. at 8a.<sup>24</sup>

### 3. Congressional Intent to Preempt State Regulation Is Demonstrated by the PWSA's Recognition of the Need for Uniform International Standards

Congressional intent to preempt state regulation is also demonstrated by the recognition in the PWSA and its legislative history of the need for uniform international standards. Congress was well aware that unilateral tanker regulation by the United States raised difficult and diplomatically sensitive foreign relations questions. The Departments of State and Transportation expressed concern that unilateral imposition of design and construction standards by the United States on foreign flag vessels might violate our obligations under the International Convention for the Safety of Life At Sea ("SOLAS"), 16 U.S.T. 185, T.I.A.S. 5780, 536 U.N.T.S., 27 (1960),<sup>25</sup> and would undermine the United States' ef-

<sup>24</sup> The Merchant Marine Act of 1970, 46 U.S.C. § 1101 *et seq.*, also evidences federal preemption of the field of tanker size and design. The Maritime Administration (MarAd) is responsible for determining the size, design and equipment of tankers to be subsidized under the Act, *see* 46 U.S.C. § 1121, and must approve tanker construction plans. 46 U.S.C. § 1151. The PWSA requires coordination between the Coast Guard and MarAd in development of federal tanker design standards. PWSA § 201(4), 46 U.S.C. § 391a(4). Additional state-prescribed design requirements beyond those required by MarAd would vitiate the tanker construction program and nullify the recent expenditure of more than \$500 million in public funds to subsidize construction of tankers which do not comply with the Tanker Law's Design Requirements. *See Brief for the United States as Amicus Curiae ("Br. U.S.")* at 29-31.

<sup>25</sup> SOLAS specifies international standards of ship design, construction and required equipment and requires U.S. acceptance of certificates of inspection issued by the vessel's flag nation. Chapter I, Regulation 17. While its standards are

forts to achieve international agreement on uniform standards of tanker design, equipment and operation at the then-impending 1973 IMCO Marine Pollution Conference. Senate Report at 44-45, 48-51. Moreover, twelve foreign governments officially protested the prospect of unilateral tanker regulation by the United States. *Id.* at 40-41.

Congress recognized that these were "justifiable concerns." *Id.* at 22. The Senate Commerce Committee agreed that "this has traditionally been an area for international rather than national action," and that "multilateral action . . . would be far preferable to unilateral imposition of standards" since "the problem of marine pollution is world-wide." *Id.* at 23. Accordingly, Title II was amended in two significant respects. First, in Section 7(C), 46 U.S.C. § 391a(7)(C), Congress postponed the earliest effective date of design regulations under Title II until after the IMCO Conference, and authorized the Coast Guard further to delay implementation of these regulations for foreign flag tankers in order to allow additional time for development of international standards. See H.R. Rep. No. 92-1178, 92d Cong., 2d Sess. (1972) (hereinafter "Conference Report"), at 12-13. Second, Section 7(C) authorized the Coast Guard to defer to internationally adopted standards "which generally address the regulation of similar topics for the protection of the marine environment," even though such standards might not be the same as those initially proposed by the Coast Guard. See Senate Report at 28; Conference Report at 13.<sup>26</sup>

primarily intended to enhance vessel safety, as a practical matter they also protect the marine environment and it "would be exceedingly difficult to generate any environmental protection design or construction requirement, regardless of its label, which did not infringe into an area of SOLAS concern." Senate Report at 49; *see id.* at 45.

<sup>26</sup> The regulations adopted by the Coast Guard under the PWSA in fact defer substantially to the standards of the 1973 IMCO

In the face of this desire for international uniformity, it is inconceivable that Congress could have intended to allow independent action by the individual states, which possess neither sensitivity to the international implications of unilateral tanker regulation nor the capacity to deal with the adverse international repercussions. *See Hines v. Davidowitz*, 312 U.S. 52 (1941); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Pink*, 315 U.S. 203, 232-33 (1942).<sup>27</sup>

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Marine Pollution Convention. The Coast Guard EIS explains that unilateral United States action would jeopardize ratification of the Convention by other nations and risk other adverse international repercussions. (A. 215-25, 330-31). *See* p. 63 *infra*. The Coast Guard's second round of regulatory proposals under the PWSA has been submitted to IMCO for consideration at a major international conference to be held in February 1978. *See* Statement of Secretary of Transportation Adams to the IMCO Council, May 23, 1977, reprinted at 123 Cong. Rec. S. 8741 (daily ed. May 26, 1977); 123 Cong. Rec. S. 8602 (daily ed. May 25, 1977); IMCO Circular Letter No. 388 (May 23, 1977).

<sup>27</sup> As the State of Washington has elsewhere argued:

"[A]s the [PWSA] and legislative history made clear, Congress . . . was mindful that design and construction standards had historically been an area for multinational agreement and action, that uniformity was desirable since tankers in international trade necessarily subject themselves to the jurisdiction of more than one nation, and that many of the tankers entering the navigable waters of the United States were of foreign registry and thus subject to the sovereignty of a foreign government. . . . Congress devoted substantial attention and concern to the issue of how to balance its desire to protect the marine environment with international considerations."

Legal memorandum submitted by States of Washington, Alaska and Oregon to U.S. Department of Transportation on Dec. 10, 1976, reprinted in *Hearings on Recent Tanker Accidents before the Senate Committee on Commerce*, 95th Cong., 1st Sess., Ser. No. 95-4, at 304 (1977).

**4. State Regulation Will Necessarily Interfere With the Coast Guard's Balancing of Interests under the PWSA**

Congressional intention to preempt is also demonstrated by provisions in both titles of the PWSA requiring the Coast Guard to balance the various competing interests affected by its regulations. Section 102(e) requires the Coast Guard to "consider fully the wide variety of interests which may be affected" in determining the need for and substance of its regulations under Title I, specifically including — in addition to environmental factors — the "minimum interference with the flow of commercial traffic" and the "economic impact and effects" of its regulations. Similarly, Section 201(4) requires Coast Guard consideration of such factors as the efficacy, cost and practicability of the vessel design requirements to be imposed under Title II. Moreover, the PWSA delegates to the Coast Guard the authority to make the difficult policy judgments which will determine the extent of the burden imposed by environmental regulations upon tanker operations. For example, Congress expressly "chose to rely on the discretion of the Secretary in determining which standards for the design, construction, maintenance and operation of tankers should be applied to tankers already in existence." Senate Report at 27.

While protection of the marine environment was undoubtedly the principal purpose behind enactment of the PWSA, the federal act — unlike the Tanker Law — requires a balancing of these environmental concerns with economic and other considerations. Senate Report at 33. The Coast Guard's decision to go only so far in its regulations under the PWSA is thus an affirmative decision that tanker regulation should appropriately go no further. More stringent state regulation of tankers necessarily disrupts the considered balance set by the Coast

Guard in its administration of the PWSA.<sup>28</sup> As the Court held in *Burbank*, where the Federal Aviation Act similarly required consideration of safety and efficiency in adoption of federal noise regulations, "[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives . . . are to be fulfilled." 411 U.S. at 638-39. See also *Northern States Power Co. v. Minnesota*, *supra*, at 1153-54; *Exxon Corp. v. City of New York*, 548 F.2d 1088, 1093 (2d Cir. 1977).<sup>29</sup> Or, as Mr. Justice Holmes put it:

"When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina Ry. v. Yarnville Furniture Co.*, 237 U.S. 597, 604 (1915).

**C. The Tanker Law's Size Limit Is Preempted**

The Size Limit imposed by Section 3(1) of the Tanker Law is preempted by both titles of the PWSA. Congress authorized the Coast Guard to impose tanker size limits in PWSA Section 101(3)(iii), and the legislative history of Title I demonstrates that Congress intended to preclude state-imposed size limits. See pp. 19-20, *supra*.

<sup>28</sup> As discussed at pp. 49-50, *infra*, Washington's Tanker Law does in fact interfere with the Coast Guard's implementation of the PWSA by attempting to exceed size and tug escort requirements the Coast Guard has imposed and to prescribe Design Requirements it has rejected.

<sup>29</sup> Appellants' attempted distinction of *Burbank* and *Northern States Power* on the ground that the federal agencies involved "were charged with the dual functions of both regulating and promoting an industry" (B.A. at 57) is untenable in light of the express congressional directive to the Coast Guard "to promote the safe and efficient conduct of maritime commerce" in Section 102(e) of the PWSA, and the Coast Guard's duty to consider the strong federal interest in promoting development of the U.S. merchant marine. See, e.g., Merchant Marine Act of 1970, discussed at n. 24 *supra*, and pp. 55-57 *infra*.

The Size Limit is also a design requirement preempted under Title II in light of the congressional intent to establish uniform federal regulation. *See p. 22, supra.*

Recognizing that the national interest demands use of large tankers, Congress directed that even Coast Guard size limits "should not be imposed universally," Senate Report at 33, but only to the extent necessary upon consideration of all relevant circumstances, including the depth and width of a particular confined channel, weather conditions, and maintenance of the flow of commercial traffic with minimum interference. *Ibid.*

The Coast Guard's regulations therefore empower its local Captains of the Port to impose size limits on a case-by-case basis as conditions may require. 33 C.F.R. § 160.35. And in the Puget Sound VTS the Coast Guard has established size regulations which permit passage of tankers over 70,000 DWT but require one-way traffic during their transit of Rosario Strait, a size limitation which is reduced to 40,000 DWT in adverse weather. (A. 65)

The Coast Guard's exercise of its size limit authority in the carefully calibrated manner directed by Congress plainly preempts the Tanker Law's absolute Size Limit. Where Congress has intended to preempt the field, state regulation is invalid if "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). The fact that the Coast Guard has not imposed an absolute size limit on tankers entering Puget Sound can lend no support to the Tanker Law's validity, particularly where, as here, "federal administration has made comprehensive regulations effectively governing the subject matter" and the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Bethlehem Steel Co. v. New York State Labor Relations*

*Board*, 330 U.S. 767, 774 (1947). *See also City of Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77, 86-87 (1958); *Napier v. Atlantic Coast Line R.R.*, *supra*, at 613.

**D. The Tanker Law's Design Requirements and Tug Escort Proviso Are Preempted**

**1. The Design Requirements, Standing Alone, Would Be Preempted**

It is evident that the Design Requirements of the Tanker Law, standing alone, would be preempted by the PWSA. The pervasive scheme of federal regulation of tanker design, the legislative history of both Titles of the PWSA, and the urgent need for uniform national regulation compel this conclusion. The features prescribed by the State — double bottoms, twin screws, extraordinary propulsion, and two radars with collision-avoidance equipment — are precisely the kinds of design requirements which the Congress directed the Coast Guard to consider and, if appropriate, to prescribe in the exercise of its regulatory jurisdiction under the PWSA. And the Coast Guard has in fact considered and rejected, at least for the present, each of these requirements. *See p. 51, infra.*

**2. The Tanker Law's Combination of Design Requirements and Tug Escort Proviso Is an Invalid Attempt to Regulate Tanker Design**

The Tanker Law's Design Requirements do not stand alone, and they can be avoided — at a price — if a tanker employs tugboats in accordance with the Tug Escort Proviso. But this case likewise does not involve the validity of a state law which simply requires tug escorts: Section 3(2) of the Tanker Law requires a tug escort only for those tankers over 40,000 DWT which do not incorporate the state-prescribed design features.

This provision of the Tanker Law is an effort by the State to regulate, albeit indirectly, the design of tankers moving in interstate and international trade — an area forbidden to the states by the PWSA. The purpose and effect of this provision is to pressure tanker operators to incorporate the state's preferred design features, and to impose an economic penalty on them for failing to do so. Appellants concede that Section 3(2) of the Tanker Law "constitute[s] a legislative expression of what the State would like to see incorporated on tankers used in Puget Sound." Brief of Appellants at 7.<sup>30</sup>

The State's intent to regulate the design and equipment of tankers is manifest in the structure of Section 3(2). Its Tug Escort Proviso is inextricably tied to its Design Requirements and must fall with them if the State is precluded by the PWSA from regulating the design of tankers. See *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 223 (1924).

The PWSA gives the Coast Guard ample authority to adopt the Tanker Law's carrot-and-stick approach to regulation of tanker design. See PWSA §§ 101(3)(iii) & (iv), 201(3). Congress specifically contemplated that the Coast Guard would use its powers under Titles I and II in tandem, recognizing that some regulatory problems "might best be attacked through a combination of vessel traffic controls and design and construction standards." Senate Report at 14.

Implementing this approach, the Coast Guard's proposed tug assistance regulations will take into account

<sup>30</sup> As Senator Washington stated during debate on the Tanker Law:

"I think we have all said one of the major reasons we are enacting this bill . . . is to give the industry notice that this is the policy of the State of Washington and that you should govern yourselves accordingly in the design and construction of the ships." Transcript of Debate, Washington State Senate, May 9, 1975, at 19.

such factors as the size of the vessel, its draft, its propulsion, and the availability of twin screws or bow thrusters. 41 Fed. Reg. at 18771. The Coast Guard EIS on tanker design likewise indicated that the Coast Guard will require tug assistance as an alternative to specified design features, thereby offering the prospective ship owner "incentives to incorporate those individual added design features which he feels are to his economic advantage, while at the same time allowing him flexibility in evaluating the economic trade-off of vessel design." (A. 303) The Coast Guard EIS gave as an example the possibility of requiring tug assistance before tankers lacking bow thrusters would be allowed to transit a particular navigational hazard under specified weather and current conditions. (*Ibid.*) This typifies the carefully-balanced regulation mandated by Congress. PWSA §§ 102(e), 201(4).

The combination of design requirements and tug escort provisos (or other incentives) can only be an effective regulatory tool at the federal level. In the absence of uniform national standards, the actual and prospective diversity of state-imposed design standards combined with tug escort or other alternatives makes investment in new tanker construction to comply with the prescribed design features impracticable. Alaska, for example, has already passed its own tanker law requiring use of tug escorts unless the tanker is equipped with an entirely different set of design features.<sup>31</sup>

<sup>31</sup> The Alaska design features are lateral thrusters; controllable pitch propellers or extraordinary astern horsepower; and double boilers. Alaska Stat. § 30.20.020(b) (Supp. 1976). The Alaska law further penalizes certain tankers by imposing increased "risk charges" unless the vessel is equipped with additional design features such as gas inerting systems and, double hulls. *Id.* § 30.25.250. The purpose of the Alaska law, the State concedes, is to "encourage . . . higher vessel design and equipment standards than currently required by the Coast Guard." Brief of the State of California, joined by the State of Alaska, *et al.*, as Amicus Curiae, at 3 n.2.

Tanker operators thus have no economic choice but to bear the penalty cost of tug escorts required by the Tanker Law. These costs are substantial: more than \$275,000 per year for Atlantic Richfield alone (A. 67-68), and, assuming the experience of Shell, Mobil, Texaco and two smaller refiners is similar, well over \$1,000,000 per year for tankers in Puget Sound. With the prospect of incurring these costs annually — and the additional costs imposed by comparable laws adopted by other states such as Alaska — the burden imposed on tanker operators will be considerable.<sup>32</sup>

### 3. Even Viewed as a Simple Tug Escort Law, the Tug Escort Proviso Is Preempted

Even if viewed as a simple tug escort law, Washington's Tug Escort Proviso is preempted by the PWSA. The Coast Guard has authority to require tug escorts under PWSA §§ 101(3)(iii) & (iv), and is implementing it on a nation-wide basis through its proposed regulations to require tug assistance for vessels operating in confined waters to provide "uniform guidance for the maritime industry and Captains of the Port," 41 Fed. Reg. at 18771. In addition, existing Coast Guard regulations empower its local District Commanders and Captains of the Port to exercise tug escort authority in congested or hazardous areas or under adverse weather conditions when "necessary for safe operation under the circumstances." 33 C.F.R. § 160.35. The Puget Sound Captain of the Port has exercised this discretionary authority to require tug escorts. While the Tanker Law has as a practical matter made it pointless for him to determine when

<sup>32</sup> Of course, the burden imposed by the Tug Escort Proviso would exist if the State had simply enacted a tug escort law. But absent the coercive aspects of the design requirements/tug escort combination, there is no way of knowing whether Washington would enact such a law or what its contours might be — e.g., whether the state might look more carefully to ascertain where and when tug escorts might serve a legitimate need.

and where tug escorts for oil tankers are "necessary," he has imposed tug escort and other operating requirements on LPG tankers and at least one other vessel not subject to the Tanker Law. See Appendix to this brief, at pp. A-3, 8, 11-12, *infra*.

The Tanker Law's tug escort requirement is inconsistent with the tug escort requirements implemented by the Captain of the Port. He has found tug escort requirements to be necessary only for selected vessels — e.g., for the "Valerie F" because of its lack of maneuverability and adverse weather conditions — and only upon reaching the entrance to Rosario Strait, an explicit recognition that tug escorts are not necessary elsewhere in Puget Sound. *Ibid.* The Coast Guard has adopted an identical approach in Prince William Sound, Alaska, rejecting a mandatory tug escort requirement in Valdez Narrows because "requiring tug assistance for these vessels on every transit of Valdez Narrows is a too restrictive approach" and "would not appreciably prevent a potential grounding by a tank vessel in the Narrows under normal circumstances." 42 Fed. Reg. at 37930.<sup>32a</sup> The Coast Guard thus left it to the vessel traffic control center to "determine whether tug assistance is appropriate on a case by case basis taking into account all relevant factors." *Ibid.* See also PWSA § 102(e).

<sup>32a</sup> The Coast Guard explained:

"Tugs are effective only when the tank vessel is proceeding at relatively slow speed, yet the tank vessel's maneuverability is less at low speeds. At higher speeds there are risks involved to both the vessel and the tugs. These risks must be weighed against the advantages of employing the tugs." *Ibid.*

The Coast Guard recently noted elsewhere that "tugs have not been without problems," citing a 300,000 gallon spill in December 1974 when an "assisting tugboat penetrated the shell of a 326,000 DWT tanker." Coast Guard Comments on Proposed Alaska Regulations, filed July 28, 1977, Encl. 4, at 4-5. See also A.122. A copy of these comments will be filed with the Clerk for the convenience of the Court.

In these circumstances, Washington's Tug Escort Proviso, even standing alone, is preempted. PWSA § 102(b). The fact that the Coast Guard has not yet adopted generally applicable standards of tug assistance is irrelevant to this preemption analysis in light of the Coast Guard's constant watch over vessel traffic in Puget Sound and its delegation of authority to the Captain of the Port to require tug escorts when and where necessary. See *Rice v. Santa Fe Elevator Corp.*, *supra*, and other cases cited at pp. 30-31, *supra*; *Exxon Corp. v. City of New York*, *supra*, at 1095-96.<sup>33</sup>

#### **4. The Solicitor General's Position, that the Tug Escort Proviso Can Stand Alone Until Preempted by Coast Guard Regulations, Is Untenable**

The brief filed by the Solicitor General in response to the Court's invitation cogently sets forth the position of the United States as *amicus curiae* that the PWSA establishes a pervasive regulatory scheme and preempts the Tanker Law's Size Limit and Design Requirements. The Solicitor General supports appellants in one respect, however. Reversing the position of the United States in the Court below, the Solicitor General attempts to salvage a piece of the Tanker Law for the time being by arguing

<sup>33</sup> Appellants point to a statement made by Coast Guard Admiral Siler, in response to a question posed to him during a recent Senate hearing, that the Coast Guard would support a state law which "add[ed] on to the existing federal standard, rather than conflict with it, say to require the use of tugs to address some particular local risk." *Hearings on Recent Tanker Accidents*, *supra*, at 463. Admiral Siler's statement is ambiguous at best. His comments do not appear to sanction state regulation of vessel size or design, nor would they support state imposition of tug escorts as a burden on non-compliance with tanker design requirements. To the extent that his comments can be read to support an independent state tug escort law, his comments are inconsistent with the PWSA, its legislative history, and its consistent interpretation by his own agency. See Opinion of the Coast Guard Chief Counsel, July 10, 1975 (A. 361-62); Coast Guard Comments on Proposed Alaska Regulations, *supra*, Encl. 1, at 2-3 (expressing Coast Guard view that Alaska tug escort requirement preempted by PWSA and Prince William Sound VTS).

that its Tug Escort Proviso should be sustained until preempted by Coast Guard regulations. This position is untenable on several independent grounds:

(1) The Solicitor General proceeds from the erroneous premise that the Coast Guard has not yet taken action to require tug escorts in Puget Sound, apparently unaware of the selective tug escort requirements recently imposed by the Puget Sound Captain of the Port. The Solicitor General concedes that state tug escort requirements will be "imminently" preempted as soon as the Coast Guard has implemented its tug escort authority, Br.U.S. at 32, 35, and specifically recognizes that the Coast Guard's regulations for the Prince William Sound VTS — requiring tankers over 20,000 DWT to use tug assistance when transiting Valdez Narrows if so directed by the Coast Guard's vessel traffic control center, 42 Fed. Reg. 37928 (July 25, 1977), 33 C.F.R. § 161.378 — preempt Alaska's recently enacted tug escort scheme, Br.U.S. at 32 n.34. In view of the existence and exercise of the identical authority by the Puget Sound Captain of the Port, Washington's Tug Escort Proviso, even viewed in isolation from its Design Requirements, must likewise be preempted.

(2) There is no basis for the Solicitor General's view that the preemptive effect of Section 102(b) is limited to state vessel equipment requirements. Br.U.S. at 33-34. Section 102(b) explicitly preempts state "safety standards" as well as equipment requirements, and in terms applies to all of Title I — including its tug escort provisions (§ 101(3)(iii) and (iv)) — not just to its provision for vessel equipment requirements (§ 101(2)). Section 102(e) requires the Coast Guard in prescribing tug escort requirements to consider a broad range of relevant factors, including the need for tug escorts under various "geographic, climatic, and other conditions" as well as the desire for "mini-

mum interference with the flow of commercial traffic.” Its balancing of these interests necessarily precludes state regulation even where the Captain of the Port determines not to require tug escorts.

Nor is there anything in Title I’s legislative history which would limit the preemptive effect of Section 102(b) to equipment requirements. On the contrary, this provision was added to alleviate concern that “each of the coastal States [might impose] different types of regulations and requirements so that an incoming vessel would be in a state of confusion,” *1970 House Hearings* at 27-28, and to “minimize the variety of requirements both foreign and domestic shipping would have to meet”. *1971 House Hearings* at 348-49.

The Solicitor General agrees that Congress in Title I intended to empower the Coast Guard to control vessel traffic and establish vessel size and speed limitations to the exclusion of the states. Br.U.S. at 40. The apparent distinction drawn by the Solicitor General between these requirements and tug escorts is incomprehensible.<sup>34</sup>

<sup>34</sup> The Solicitor General proceeds on the mistaken assumption that the power to require tug escorts is one traditionally exercised by the States. Br.U.S. at 32. In contrast to state pilotage laws, however, which date back to the nation’s founding and which are the only state vessel regulations expressly recognized in the PWSA, the escort use of tugboats mandated by Washington’s Tanker Law is a usage unsupported by historical precedent or maritime experience. While tugboats have long been used to assist vessels in the immediate docking and undocking from port facilities (A.67), and more recently have been selectively required by the Coast Guard in confined channels, the Tanker Law requires the use of several tugs to accompany each tanker headed for Cherry Point through 45 miles of largely open water. (A. 64, 67, A.A.) Appellants concede there is good faith dispute whether this use of tugboats makes any contribution to reducing the likelihood of an oil spill in Puget Sound. (A.84) Aside from Washington’s Tanker Law and the recently enacted Alaska statute, we are unaware of any other state law requiring tug escorts, and appellants have not cited any.

(3) The Solicitor General acknowledges that the Tanker Law’s Tug Escort Proviso must be viewed as a “burden on non-compliance” with Design Requirements that the state has no power to prescribe, and that Section 3(2) thus “works somewhat at cross-purposes with the PWSA” in light of the congressional intent to establish uniform federal regulation of tanker design. Br.U.S. at 34-35. We can perceive no principle which would allow a state to “penalize the operators of vessels that do not comply with design and construction standards different from those established by the federal government,” *id.*, where, as here, Congress has mandated exclusive and uniform federal regulation. In arguing that the Tanker Law’s combination of Design Requirements and Tug Escort Proviso should be upheld unless it “works a substantial and immediate interference with the federal scheme,” *id.* at 35-36, the Solicitor General has seemingly forgotten that the principal issue here is whether Congress in the PWSA intended to preempt such state regulation of vessel design, not whether the state law in fact conflicts with the federal scheme.

(4) The Solicitor General concludes that Washington’s attempt to “penalize noncompliance” with the Design Requirements should be disregarded because the costs of compliance with the Tug Escort Proviso are “insubstantial”. Br.U.S. at 36. Yet compliance has already cost Atlantic Richfield over \$500,000, and the continuing burden of such expense — together with the prospect of comparable or greater penalties in other states — is consequential. The implicit assumption underlying the Solicitor General’s view is that Atlantic Richfield has a deep pocket, hardly a neutral principle on which to base a preemption decision. It is impossible to see how such penalties for non-compliance with state design requirements can be sustained in light of the PWSA’s objective of uniform federal regulation of vessel design.

**E. Federal Preemption of Tanker Design and Movement Does Not Invade An Area of Traditional State Authority**

There is no basis for appellants' contention that federal preemption of the Tanker Law would "radically upset an area of traditional state authority." B.A. at 24. The line drawn by the PWSA between state authority to regulate "structures" and port facilities on land and exclusive federal authority to regulate the design and operation of vessels is grounded on substantial historical precedent.<sup>34</sup>

Appellants' reliance on several cases which upheld state power over various local aspects of port and harbor regulation, B.A. at 26, is misplaced. None of these cases involves state regulation of vessel design or equipment, and none sustains state regulation in the face of a federal statute arguably preempting the field. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1851), was based upon a federal statute expressly authorizing state regulation of pilotage of registered vessels. See 53 U.S. at 315-21. *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881), and *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882), rely on state power to control the use of wharves and docking facilities, and support the distinction drawn by Congress in the PWSA. As the Court in *Parkersburg* stated, "wharves, levees, and landing-places . . . are attached to the land; . . . and they are primarily, at least,

<sup>34</sup> In addition to the long-standing and exclusive federal regulation of vessel design and equipment discussed above, control of vessel movement, navigation and navigable waters has long been a paramount federal responsibility. See, e.g., Submerged Lands Act, 43 U.S.C. §§ 1311(d), 1314(a) (preserving "paramount" federal right to control navigation through territorial waters ceded to states); Rivers and Harbors Act, 33 U.S.C. §§ 401, 403 (requiring federal approval for obstruction of navigable waters); Inland Rules of the Road, 33 U.S.C. §§ 151 *et seq.* (domestic navigation rules); and International Regulations for Preventing Collisions at Sea, 33 U.S.C. §§ 1051 *et seq.* (international navigation rules).

subject to the local State laws," whereas the United States "is invested with supreme and paramount authority" over navigable waters. 107 U.S. at 700-01; see *Packet Co. v. Catlettsburg*, *supra*, at 562.

The three modern Court decisions relied on by appellants to support local regulation of tankers, B.A. at 42 n.50, in fact show that the Tanker Law exceeds the generally understood limits upon state regulation of vessels.

In *Kelly v. Washington*, *supra*, the Court merely upheld a Washington law providing for inspection of vessels *not* subject to federal inspection. See 302 U.S. at 4-5, 13-14. At the same time, the Court struck down the design and equipment requirements of the Washington law because of the need for uniform national standards. *Id.* at 14-15.

In *Huron Portland Cement Co. v. City of Detroit*, *supra*, the Court upheld the application of a Detroit smoke abatement ordinance to vessels on the ground that the preemptive scope of the federal vessel inspection laws was at that time limited to vessel safety and did not encompass air pollution control. With the PWSA's expansion of the purposes of federal tanker regulation to encompass protection of the marine environment, the holding of *Huron* supports the preemption holding of the court below. J.S. at 10a-11a.<sup>35</sup> See also, *Lockheed Air Terminal v. City of Burbank*, 457 F.2d 667, 672-73 (9th Cir. 1972), *aff'd*, 411 U.S. 624 (1973). Moreover, the Detroit ordinance was "not . . . a direct regulation of commerce." 362 U.S. at 447. It applied to all emission sources within the City, not solely to vessels in

<sup>35</sup> Since both the PWSA and the Tanker Law are intended to protect the marine environment against the danger of oil spills, this case does not present any question whether state-imposed requirements to control air pollution from tankers would be preempted by federal law.

interstate or foreign trade, and it did not by its terms regulate vessel design and equipment.

*Askew v. American Waterways Operators*, 411 U.S. 325 (1973), upheld the validity of a Florida law imposing strict liability for oil pollution damage. As the three-judge court noted, however, the Florida statute "did not attempt to regulate the design of the tanker or tanker operations." J.S. at 10a.<sup>36</sup> The preemption issue in *Askew* involved the Federal Water Pollution Control Act which, in contrast to the PWSA, expressly disclaims any intent to preempt the states from imposing liability for oil spills. 33 U.S.C. § 1321(o)(2).<sup>37</sup>

#### F. Other Federal Statutes Do Not Support State Regulation of Tanker Design and Operation

Appellants seek to sidestep the preemptive intent of the PWSA by arguing that Congress in other federal statutes — particularly the Federal Water Pollution Control Act ("FWPCA"), Coastal Zone Management Act ("CZMA"), and Deepwater Port Act ("DWPA") — has allowed the states a role in other aspects of water pollution control or port regulation. However, there is no basis for reading these statutes to establish a general federal policy of "cooperative federalism" which would authorize the Washington Tanker Law. None of these statutes relates to tanker design or navigation or purports to authorize state regulation of those subjects. On the contrary, as the court below recognized, the very fact that these statutes explicitly invite state participation highlights the absence of any comparable intent by Congress in enacting the PWSA. (J.S. at 9a.)

<sup>36</sup> The Court expressly reserved decision on the validity of one provision of the Florida law authorizing a state agency to require vessels to carry "containment gear" for oil spill cleanup. 411 U.S. at 336-37.

<sup>37</sup> Washington law elsewhere imposes strict liability for damages caused by oil spills. R.C.W. § 90.48.320.

The Federal Water Pollution Control Act deals with oil spill liability and cleanup, and it is only in this field that its nonpreemptive provision allows state regulation. The legislative history of the PWSA emphasized the distinction between the FWPCA's regulation of liability and clean-up, and the PWSA's regulation of tanker design and movement to prevent oil pollution. *Hearings on Port and Waterways Safety — Part 2, Before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 92d Cong. 2d Sess., at 192-94 (1972); Senate Report at 9. The FWPCA does not diminish the Coast Guard's exclusive authority to regulate tanker design and navigation under the PWSA. See FWPCA § 511(a), 33 U.S.C. § 1371(a); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976).<sup>38</sup>

It is equally clear that the Coastal Zone Management Act does not authorize state regulation of vessel design or navigation. While the Act "encourage[s] the states to exercise their full authority" in the coastal zone, CZMA § 302(h), 16 U.S.C. § 1451(h), nothing in the Act purports to give the states any authority they did not already have or allows the states to interfere with the Coast Guard's exclusive regulation of tanker design and movement under the PWSA. See CZMA § 307(e), 16 U.S.C. § 1456(e).

<sup>38</sup> Where the FWPCA does touch on vessel design and navigation, it affirmatively indicates an intention to preclude state regulation. Thus, the dredging activities of the Army Corps of Engineers are not subject to state permit requirements under the FWPCA because "the overriding concern of the Congress in this context was for the maintenance of unimpeded traffic in the navigable waters of the United States." *Minnesota v. Hoffman*, 543 F.2d 1198, 1209 (8th Cir. 1976), cert. denied, 434 U.S.L.W. 3706 (Apr. 25, 1977). See also *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976). In one section dealing with vessel equipment requirements, Section 312(f)(1), 33 U.S.C. 1322(f)(1), the FWPCA expressly preempts state regulation of marine sanitation devices because of the "urgent need for uniformity." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 136 (1972).

Nor is the approval of the Washington Coastal Zone Management Program by the National Oceanic and Atmospheric Administration ("NOAA") relevant to this appeal. The Tanker Law is not a part of the State's Program. It is mentioned only once in passing in the 300-page Program document (Pre-Trial Order Ex. AAA, p. 18), and that one brief reference noted that the Tanker Law was being challenged as unconstitutional. The Program does not identify the Tanker Law as one of the means to be employed to control land and water uses in the coastal zone, as required by 16 U.S.C. § 1454(b)(4). And the NOAA Administrator who approved the State Program has expressly disclaimed any intention of approving the Tanker Law as part of the Program. (A. 358) As the United States informed the court below, "the Coastal Zone Management Act and the State of Washington's plan thereunder have nothing to do with the field of tank vessel regulation." Reply Brief of the United State as Amicus Curiae at 3.

The Deepwater Port Act of 1974 likewise does not authorize state regulation of tanker design or navigation. Appellants simply misread the DWPA in contending that it gives the states "final authority over supertanker use off their coasts." (B.A. at 53) The DWPA does not authorize state regulation of the size, design or navigation of the tankers using a deepwater port facility. On the contrary, Section 10 of the Act, 33 U.S.C. § 1509, directs the Secretary of Transportation to establish federal regulations governing the movement, equipment and operation of such tankers.

Section 9 of the DWPA, 33 U.S.C. § 1508, does require the approval of the governor of an "adjacent coastal state" before *construction* of a deepwater port, but this veto power is merely a seaward extension of the states' existing "regulatory control over construction of on-shore port-related facilities." S. Rep. No. 93-1217, 93d

Cong., 2d Sess. (1974), (hereinafter DWPA Senate Report), at 11.<sup>29</sup> The states' veto power over deepwater port construction was adopted to afford coastal states the opportunity to protect themselves from the economic and environmental impacts of land-based "petroleum related industrialization" and "secondary development" generated by a deepwater port. DWPA Senate Report at 10. See also H.R. Rep. No. 93-668, 93d Cong., 1st Sess. 3-4 (1973); H.R. Rep. No. 93-692, 93d Cong., 1st Sess. 17-18 (1973); Opinion of the Secretary of Transportation Approving Application of Seadock, Inc., Dec. 17, 1976, at 32-34 (denying Florida adjacent coastal state designation on ground, *inter alia*, that consideration of environmental impact of increased large tanker traffic "went well beyond the requirements of the Act").<sup>30</sup>

Indeed, the basic purpose of the DWPA was to enable the United States "to benefit from the economic and environmental advantages" of large tankers. DWPA Senate Report at 7; see also H.R. Rep. No. 93-668, *supra*, at 1-2. And Congress recognized that these benefits are in some instances equally attainable in existing port areas. 33 U.S.C. § 1503(d).<sup>31</sup>

<sup>29</sup> A deepwater port is defined in the Act as "any fixed or floating manmade structures other than a vessel . . ." 33 U.S.C. § 1502(10). Compare PWSA § 102(b).

<sup>30</sup> Contrary to appellants' claim (B.A. at 53 n.63), state power to regulate the design, equipment or operation of tankers has not been recognized in implementation of the DWPA. In settlement of Florida's legal action challenging the Secretary's denial of adjacent coastal state status, he merely agreed to consider Florida's design and operation proposals in the promulgation of *federal regulations* under the DWPA. Stipulation of Settlement and Voluntary Dismissal, *Askev v. Coleman*, No. 76-2005 (D.D.C., Jan. 25, 1977).

<sup>31</sup> Appellants also rely (B.A. at 37) on Section 7(d) of the Dangerous Cargo Act, 46 U.S.C. § 1707(d), which provides that the Act does not preempt reasonable local regulations relating to the carriage and handling of explosives and other dangerous substances. But this statute does not apply to tankers, see 46 U.S.C. § 1701, and is too remotely related to the PWSA to be

**G. Regulation of Tanker Design and Navigation Belongs Exclusively in the Federal Forum**

Atlantic Richfield supported passage of the PWSA in the belief that comprehensive federal standards for the construction and operation of tankers and control of vessel traffic were "urgently needed to strengthen existing laws which are designed to protect the environment." *Senate Hearings* at 237. It shares appellants' concern that rigorous tanker safety standards be enforced to protect the nation's waters. But, as the United States framed the issue in this case in the court below:

"[T]he question is not whether the design and operation of oil tankers should be regulated and controlled in the interests of the marine environment, for it is common ground that such regulation is required. The question in this case is whether that control is to be exercised and the scope of the regulations determined by the federal government in the manner which Congress has prescribed, or whether those determinations are to be made by the inconsistent and diverse action of the several states." Brief of the United States as Amicus Curiae at 9-10.

The risk of such "inconsistent and diverse action" is real. As noted above, the State of Alaska has already enacted legislation which requires payment of substantial "risk charges" as well as use of tug escorts unless tankers meet design requirements entirely different from those required by the Washington Tanker Law. More-

of any significance in determining the PWSA's legislative intent; it is not so much as mentioned in the text of either committee report. Section 7(d) was enacted primarily to assure local port authorities that they could continue to regulate the use of docking facilities to protect them from explosions, and not to allow state regulation of the design or operation of the vessels themselves. See *Hearings on H.R. 7357 before the House Committee on Merchant Marine and Fisheries*, 76th Cong., 3d Sess. (1940), at 29-35, 42-46, 90.

over, the Alaska risk charge scheme, recognizing the environmental advantages of larger tankers, encourages use of the tankers over 125,000 DWT prohibited by Washington and penalizes use of smaller tankers.<sup>42</sup> California, Oregon, Maine, and other states are waiting in the wings. Brief of California *et al.* as Amicus Curiae, at 3 n.2; Oregon Senate Bill 577, 1977 Regular Session; Brief of Maryland, *et al.*, as Amicus Curiae, at 13; see generally Pre-Trial Order ¶ 153. The probability of proliferating state regulation of the size, design and navigation of tankers underscores the need for national uniformity. See *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 627-28, 639 (1973); *Kelly v. Washington*, 302 U.S. 1, 14-15 (1937); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945). As this Court recently held, "[s]uch proliferation . . . would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent." *Douglas v. Seacoast Products*, 45 U.S.L.W. 4488, 4493 (May 23, 1977), slip op. at 21.

Congress recognized this need for uniform federal regulation in enacting the PWSA. If more stringent regulation of tankers is required, it must take place at the federal level. Federal regulatory activity in this area is active and ongoing. The Coast Guard under the

<sup>42</sup> Proposed regulations to implement the Alaska law indicate that calculation of risk charges will be based on a "vessel pollution coefficient" assigned to each tanker. The vessel pollution coefficient will be determined by the design features of the tanker, adjusted by a "traffic ratio" equal to 40,000 DWT divided by the deadweight tonnage of the tanker. As a result, a 75,000 DWT tanker will be assessed twice the "risk charge" of a similarly equipped 150,000 DWT tanker. In addition, the total annual burden is dependent upon the number of port calls each vessel makes, which will be lower if larger vessels are used. See proposed 18 Alaska Admin. Code § 20.050, Notice of Proposed Changes in the Regulations of the Alaska Department of Environmental Conservation, dated June 10, 1977. A copy of these proposed regulations is being lodged with the Clerk for the convenience of the Court.

Carter Administration has adopted or proposed a host of new regulations touching virtually every aspect of tanker design and movement.<sup>43</sup> Congress is also considering action to amend the PWSA, and on May 26, 1977, the Senate passed S.682, which would mandate Coast Guard adoption of specified design and equipment requirements, including double bottoms for new vessels and a second radar with collision-avoidance capability. 123 Cong. Rec. S.8748-53 (daily ed.); see S. Rep. No. 95-176, 95th Cong., 1st Sess. (1977).

The Constitution, the PWSA and common sense require that tanker regulation remain exclusively in this national forum.

## II. THE TANKER LAW CONFLICTS WITH THE PWSA AND ITS IMPLEMENTATION, WITH THE FEDERAL VESSEL REGISTRATION, ENROLLMENT AND LICENSING LAWS, AND WITH FEDERAL POLICY PROMOTING CONSTRUCTION AND USE OF LARGE TANKERS

The decision of the court below can be affirmed on several alternative grounds which were raised but not decided in the three-judge court.

Even if not preempted by the PWSA, the Tanker Law is invalid under the Supremacy Clause if it conflicts with the PWSA or other federal legislation or the administration of a federal program. *Jones v. Rath Packing Co.*, *supra*, at 4325, 4328-29; *De Canas v. Bica*, 424 U.S. 351, 363-65 (1976). While appellants argue that there is

<sup>43</sup> Appellant environmental groups had previously filed suit against the Coast Guard alleging that its regulations did not comply with its statutory mandate under the PWSA. *Natural Resources Defense Council v. Coleman*, No. 76-0181 (D.D.C., filed Feb. 2, 1976). That action has been stayed by stipulation filed April 21, 1977, pending the outcome of the current rule-making proposals.

no conflict because it is physically possible at present to comply with both federal and state laws, this is not the test. Rather, the Tanker Law is invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, *supra*, at 4325; *Perez v. Campbell*, 402 U.S. 637, 649 (1971). See also *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 240 (1967); *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964).

### A. The Tanker Law Conflicts with the PWSA and Its Implementation by the Coast Guard

The Tanker Law's Size Limit conflicts with Section 101(3)(iii) of the PWSA and Coast Guard regulations. Congress in enacting this Section considered the desirability of absolute size limits on tankers entering U.S. ports at the urging of appellant Sierra Club, *1971 House Hearings* at 379; *Senate Hearings* at 77-78, 84-86, and rejected such a sweeping prohibition on the ground that it would require "more tankers" to meet "the requirements for oil in the Nation." *Id.* at 79-80 (Statement of Sen. Inouye). See also *1971 House Hearings* at 30, 32. The Coast Guard's regulations and the Puget Sound VTS are true to the congressional intent that size limitations "not be imposed universally" but only to the extent necessary after careful weighing of all relevant factors. Senate Report at 33. The Tanker Law Size Limit, absolutely barring tankers over 125,000 DWT from all of Puget Sound, is inconsistent with these regulations and the underlying congressional intent. See *Lockheed Air Terminal v. City of Burbank*, *supra*, 457 F.2d at 676 (conflict with federal agency's balancing of interests).

Section 3(2) of the Tanker Law is invalid in its effort to coerce adoption of Design Requirements considered and rejected by the Coast Guard. The Design Requirements in effect nullify these Coast Guard decisions.

While the Coast Guard is presently reconsidering its initial rejection of double bottoms and collision-avoidance radars,<sup>44</sup> it has shown no indication of any intention to reconsider its rejection of the extraordinary horsepower and twin screws also required by the Tanker Law. The Coast Guard rejected the horsepower requirement because it would not effectively decrease stopping distance and because it "has not been able to document one case where inadequate stopping of a large tanker was a major contributing cause in a marine accident." (A. 296-97). The Coast Guard found that twin screws would produce only a marginal improvement in the slow-speed turning ability of a tanker. (A. 288, 298-99) The "primary reason" for rejecting both requirements was "the absence of any evidence that the improvements in maneuvering and stopping ability which these features and equipment would provide for large tankers would materially reduce the possibility of collisions, grounding, or other accident." (A. 288)

The Tug Escort Proviso of the Tanker Law also conflicts with federal implementation of the PWSA, for the reasons set forth at p. 35 *supra*.

<sup>44</sup> See p. 17 *supra*. The Coast Guard rejected double bottoms because of the desirability of accepting uniform international standards contained in the 1973 IMCO Convention (A. 214-21, A. 286-87), and because of its view that side-damaging accidents – for which "double bottoms would be ineffective" – may be a more substantial problem than bottom-damaging accidents, especially in port areas like Puget Sound where the water is deep. A. 287, 305-10; 40 Fed. Reg. at 48289; 41 Fed. Reg. at 1480-81. See also *Hearings on S. 333 Before the National Ocean Policy Study of the Senate Committee on Commerce*, 94th Cong., 1st Sess., Ser. No. 94-7, at 26 (1975). Coast Guard regulations therefore permit a variety of distributions of segregated ballast space. See 40 Fed. Reg. at 48289; 41 Fed. Reg. at 1482.

The Coast Guard rejected collision avoidance radar because the technology is "still in the developmental stage." Notice of Proposed Rulemaking, 41 Fed. Reg. 18765, 18766-67 (May 6, 1976).

**B. The Tanker Law Conflicts with the Certification and Permit Provisions of the Tank Vessel Act as Amended by the PWSA**

The Tanker Law also conflicts with the certification and permit provisions of the Tank Vessel Act, as amended by the PWSA. All U.S. flag tankers must obtain a certificate of inspection under the Tank Vessel Act as amended by the PWSA, issued only if the Coast Guard "approves the vessel and her equipment throughout." 46 U.S.C. § 399. All foreign flag tankers must carry an equivalent certificate of inspection from their flag nation under SOLAS. Under Section 6 of the amended Act, all tankers must also obtain a certificate of compliance with Coast Guard environmental regulations. And, most important, under Section 5 of the amended Act, all U.S. flag tankers must obtain a permit which constitutes an express grant of authority to engage in the transportation of particular kinds or grades of oil. This permit is construed by the Coast Guard as a "permit for such vessel to operate." 46 C.F.R. § 31.05-1(b).

No state may prohibit the exercise of a right granted by federal law, *see, e.g., Sperry v. Florida*, 373 U.S. 379, 385 (1963), particularly where the state seeks to exclude a carrier engaged in interstate transportation under federal authority. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Toye Bros. Yellow Cab Co. v. Irby*, 437 F.2d 806 (5th Cir. 1971). The federal permits, approvals and certificates held by tankers under the amended Tank Vessel Act are an express grant of federal rights to engage in oil transportation. The Tanker Law's ban excluding tankers over 125,000 DWT from Washington waters effectively revokes these rights and thus impermissibly conflicts with federal law. The penalty imposed by Section 3(2) on smaller tankers for noncompliance with the Design Requirements substantially interferes with the exercise of these rights.

**C. The Tanker Law's Size Limit Conflicts with the Federal Vessel Registration, Enrollment and Licensing Laws**

The Tanker Law's exclusion of tankers over 125,000 DWT from Washington waters is invalid as applied to U.S. flag vessels because it conflicts with the federal vessel registration, enrollment and licensing laws as they have been consistently interpreted for over 150 years. All tankers engaged in domestic trade — including the 150,000 DWT tankers under construction for Atlantic Richfield and all other tankers to be employed in the Alaska trade — must be enrolled and obtain a license in the form prescribed by 46 U.S.C. § 263, and are thereby "entitled to the privileges of vessels employed in the coasting trade." 46 U.S.C. § 251.

It has been established since *Gibbons v. Ogden, supra*, that these laws convey an affirmative right to engage in the coastwise trade, and that a state cannot completely exclude an enrolled and licensed vessel from its waters. See 22 U.S. at 211-22. This Court only recently reaffirmed this holding. In *Douglas v. Seacoast Products, supra*, the Court "emphatically reject[ed]" the contention of appellants here that the federal licenses are merely a registration device, holding instead that they are "a grant of the right to navigate in state waters." 45 U.S.L.W. at 4492, slip op. at 14-15. Indeed, the Court held that the federal license grants "all the right which Congress has the power to convey." *Ibid.*

Concededly, "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." *Huron Portland Cement Co. v. City of Detroit, supra*, at 447. As the Court in *Seacoast Products* stated after reviewing the cases, "States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental

protection measures otherwise within their police power."<sup>45</sup> 45 U.S.L.W. at 4491, slip op. at 11.

But the Tanker Law's Size Limit absolutely excludes all tankers over 125,000 DWT, not because of their failure to comply with reasonable, non-discriminatory state environmental laws, but because of the immutable characteristics of the vessel itself. In this respect, the Tanker Law abridges the rights granted by Congress, which entitle federally-licensed tankers over 125,000 DWT to enter Washington waters on equal terms with smaller tankers.<sup>46</sup>

No case sustains state power absolutely to exclude federally licensed vessels on the basis of the characteristics of the vessel itself. On the contrary, the Court in *Huron* reiterated the "well delineated" understanding that "[a] state may not exclude from its waters a ship operating under a federal license." 362 U.S. at 447. In upholding application of a Detroit air pollution ordinance to federally licensed vessels, the Court in *Huron* was careful to point out that "the ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage." *Id.* at 448. The Tanker Law's Size Limit does both.<sup>47</sup>

Appellants argue, however, that the state has power to exclude tankers over 125,000 DWT, notwithstanding

<sup>45</sup> The Tanker Law's Design Requirements and Tug Escort Proviso may well be invalid under the *Seacoast Products* test because of their exclusive and thus discriminatory impact on vessels engaged in interstate and foreign transportation of oil. (A. 57)

<sup>46</sup> While all of the decided cases involve licensed and enrolled vessels engaged in coastwise trade, the same principles apply to registered vessels engaged in foreign trade. Registered vessels are "deemed vessels of the United States and entitled to the rights and privileges [thereof]." 46 U.S.C. § 221. This language is virtually identical to the language of 46 U.S.C. § 251 relied upon by Chief Justice Marshall in *Gibbons*, 22 U.S. at 212-13, and by the Court in *Seacoast Products*, 45 U.S.L.W. at 4492, slip op. at 15.

their federal licenses, because they are hazardous and unsafe — indeed, akin to diseased animals. (B.A. at 68) They rely on *Kelly v. Washington*, *supra*, where the Court suggested that a state could exclude a vessel if it were “actually unsafe and unseaworthy in the primary and commonly understood sense.” 302 U.S. at 15. But Washington’s arbitrary exclusion of all tankers over 125,000 DWT as “unsafe” flies in the face of the *prima facie* safety and seaworthiness of these vessels implicit in federal inspection and certification under the Tank Vessel Act. There is not the slightest evidence in the record that such tankers are unsafe or unseaworthy in the commonly understood sense, or that the State has made any such determination. On the contrary, appellants have conceded that there is good faith dispute whether use of such tankers poses any greater environmental risk than use of smaller tankers. (A. 84)

Appellants also contend that the Size Limit should be sustained because it excludes tankers over 125,000 DWT, not from all the State’s waters, but “only” from Puget Sound. This contention is both legally irrelevant and factually misleading. The Tanker Law excludes such tankers from a major international waterway, containing all of the State’s refineries, oil docking and terminal facilities, and major ports. (A. 47-48, 73, 75). While appellants point out there are other areas which are “reasonably developable as port sites” where such tankers “might be accommodated” (B.A. at 67 n.74), the fact is that there are no such facilities in existence outside Puget Sound (A. 75), and a pending proposal to construct such a facility at Port Angeles is, at best, a distant dream. (A. 51-52)

**D. The Tanker Law’s Size Limit Conflicts With Federal Policy Supporting Construction and Use of Tankers Over 125,000 DWT**

The Tanker Law’s Size Limit conflicts with federal policy supporting the construction and use of large tankers over 125,000 DWT, as particularly expressed in the Merchant Marine Act of 1970 and the Tanker Construction Program established thereunder by the Maritime Administration (“MarAd”). The purpose of the Merchant Marine Act is to promote development of an American merchant marine capable of carrying “a substantial portion of the waterborne export and import foreign commerce of the United States.” 46 U.S.C. § 1101. The 1970 revision extended the Act’s construction differential subsidy program to oil tankers for the first time, S. Rep. No. 91-1080, 91st Cong., 2d Sess. (1970), at 19, 64; H.R. Rep. No. 91-1073, 91st Cong., 2d Sess., at 23 (1970), with the goal of “creation of a more efficient U.S. merchant fleet composed of modern highly productive ships.” S. Rep. No. 91-1080, *supra*, at 20. See also, *id.* at 12-17; H.R. Rep. No. 91-1073, *supra*, at 38. The Act imposes on MarAd the duty to develop an “adequate and well-balanced” United States merchant fleet and specifically to determine the “size . . . of the vessels . . . which should be employed” in carrying necessary U.S. oil imports. 46 U.S.C. §§ 1120, 1121.

MarAd’s Tanker Construction Program is intended to promote the subsidized private construction of a balanced fleet of tankers of various sizes, including Very Large Crude Carriers (“VLCC’s”) of roughly 250,000 DWT; Jumbo VLCC’s of about 400,000 DWT, and ore/bulk/oil carriers of 80,000 to 165,000 DWT. See Final Environmental Impact Statement, Maritime Administration Tanker Construction Program, N.T.I.S. Rep. No. EIS-730-725-F (May 30, 1973) (hereinafter “MarAd EIS”), at a, II-20 to II-36. MarAd has rejected the suggestion of appellant Environmental

Defense Fund that it should stop subsidizing these larger tankers. Citing the "major transportation cost savings" of large tankers, the prevalence of such tankers in the world fleet, and the environmental advantages of reduced congestion, MarAd concluded that "large-size tankers serving a wide range of ports will be necessary for the efficient, economic transport of U.S. oil imports." *In re Environmental Review of the Maritime Administration Tanker Construction Program*, Docket No. A-75, at 20 (Maritime Subsidy Board, Aug. 30, 1973). See also *id.* at 6; MarAd EIS at II-7, IV-159, VI-34, VI-37.<sup>47</sup>

Appellants' suggestion that the Merchant Marine Act and MarAd Tanker Construction Program were only intended to develop a large tanker fleet to serve off-shore deepwater ports is without merit. The Merchant Marine Act pre-dated the Deepwater Port Act by more than four years. While it was contemplated that large tankers would use such deepwater ports, if any is ever constructed, MarAd also anticipated that existing deepwater harbors would be utilized. MarAd EIS at IV-63 to IV-70, IV-170. Indeed, MarAd specifically recognized that "Puget Sound is likely to be used by deep draft vessels built under the MarAd Tanker Construction Program, particularly by tankers exceeding 100,000 DWT." *Id.* at IV-94.<sup>48</sup>

MarAd has in fact committed substantial federal resources to the support of tankers over 125,000 DWT.

<sup>47</sup> The Senate Commerce Committee, chaired by Senator Magnuson, has declared: "Construction of more VLCC's is vital to our national security since these are the vessels that can transport the largest quantity of oil over the longest distances at the cheapest prices." S. Rep. No. 93-1031, 93d Cong., 2d Sess. 7 (1974).

<sup>48</sup> MarAd has also sought to develop large shallow draft tankers to be used in shallower existing ports. See Docket No. A-75, *supra*, at 21-22; MarAd EIS at VI-75 to VI-76.

Nearly \$200 million has already been spent and an additional \$224 million committed to subsidize construction of tankers of this size. (A. 59-69). Washington's exclusion of such tankers from one of the few American port areas that can accommodate them jeopardizes the success of the federal program and frustrates the accomplishment of the objectives of Congress.

### **III. THE TANKER LAW IS INVALID UNDER THE COMMERCE CLAUSE BECAUSE IT WILL SUBSTANTIALLY IMPEDE THE EFFICIENT FLOW OF COMMERCE IN AN AREA DEMANDING UNIFORM REGULATION**

Even in the absence of preemptive or conflicting congressional action, the Tanker Law's regulation of tankers in interstate and foreign trade is invalid under the Commerce Clause. Const. Art. I, § 8, cl. 3. Protection of the channels of interstate transportation is central to the meaning of the Commerce Clause, for "[t]ransportation is essential to commerce." *Railroad Co. v. Husen*, 95 U.S. 465, 470 (1877). The Commerce Clause precludes state laws which substantially impede the free and efficient flow of interstate and foreign commerce or which attempt to regulate in an area demanding a uniform national rule. *Southern Pacific Co. v. Arizona*, *supra*, at 767; *Cooley v. Board of Wardens*, *supra*, at 319; *California v. Zook*, 336 U.S. 725, 728 (1949).

There can be little doubt at this late date that regulation of the size, design and equipment of tankers in interstate and international trade is an area imperatively demanding uniform national rule. The Court in *Southern Pacific Co. v. Arizona*, *supra*, in striking down analogous state regulation of the size of freight trains, held that "if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the

operation of an efficient and economical national railway system." 325 U.S. at 771. *See also id.* at 775. The Court in *Kelly v. Washington, supra*, specifically held that state-imposed vessel design and equipment requirements were invalid because of the need for national uniformity:

"The state law . . . has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. . . ."

" . . . If . . . the State . . . attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule." 302 U.S. at 14-15.

See also *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526-27 (1959); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946).

The business of oil transportation, certainly no less than commercial fishing, "must be conducted by peripatetic entrepreneurs moving . . . without regard for state boundary lines." *Douglas v. Seacoast Products, supra*, at 4493, slip op. at 20. It would be intolerable if every port involved in the oil transportation system were empowered to impose its own independent criteria for the size, design or equipment of tankers. The practical and efficient conduct of tanker operations requires the flexible

use of tankers and the ability to call at any port, so as to permit last minute changes in destination to meet changing refinery needs and to allow vessel cargo exchanges to alleviate spot shortages and effect transportation efficiencies. (A. 62-63) Compare *Bibb v. Navajo Freight Lines, supra*, at 527-28.<sup>49</sup> State-imposed size, design and equipment standards would disrupt tanker operations far beyond the state's boundaries. Compare *Southern Pacific Co. v. Arizona, supra*, at 775. If one state can impose regulations for the size, design and equipment of tankers, so can every other, and the resulting patchwork of state regulation would substantially disrupt the operation of this complex oil transportation system. *Ibid.*; *Kelly v. Washington, supra*, at 14-15; *Morgan v. Virginia, supra*, at 381-82; *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 538-39 (1949).<sup>50</sup>

The need for uniform federal regulation of tanker size, design and equipment is particularly critical because of the substantial impact of such regulation on foreign commerce and the foreign vessels carrying 94% of U.S. oil imports. (A. 58). As the Court held in *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1876): "A regulation which imposes onerous . . . conditions on those engaged in active commerce with foreign nations must of

<sup>49</sup> The Coast Guard has determined that the same requirements shall be applied to vessels in domestic trade as are applied to vessels in foreign trade, based on its conclusion that "pollution regulations for all U.S. seagoing tank ships should be uniform, irrespective of the trade in which they are engaged," in large part because of "the need to allow owners the flexibility to use vessels in either trade." 40 Fed. Reg. at 48280.

<sup>50</sup> It is hard to see what comfort appellants draw from *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 267 (1935), or other cases sustaining local port regulations against commerce clause attack. None of these cases sustains state regulation of the size, design and equipment of the vessels themselves. And even as to local port regulations, the Court in *Clyde Mallory Lines* held such regulations valid only if they do not "impede the free flow of commerce" — as the Tanker Law surely does — and if Congress has not regulated in the area — as it has here.

necessity be national in its character." See also *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U.S. 326, 336 (1887).<sup>51</sup>

The Tanker Law's Size Limit is invalid in light of these principles. The Tanker Law absolutely bars tankers over 125,000 DWT from Washington waters, regardless of the amount of oil they may actually be carrying; and tankers, unlike the trains at issue in *Southern Pacific*, cannot be broken up and reconstructed at the state's borders. State laws which attempt to close the state's doors to interstate commerce – not to mention foreign commerce – are particularly disfavored under the Commerce Clause. *Buck v. Kuykendall*, 267 U.S. 307, 316 (1925); *Railroad Co. v. Husen*, *supra*, at 469-70, 472-73. See also *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186 (1950).

Moreover, the Size Limit will substantially interfere with the national interest in efficient and low-cost transportation of essential oil imports. See 49 U.S.C. § 1651(a); *Southern Pacific Co. v. Arizona*, *supra*, at 783-84. The Tanker Law deprives Atlantic Richfield and the consuming public, in Oregon and other states as well as Washington, (A. 48-49) of the substantial savings in

<sup>51</sup> The principal impact of the Tanker Law, for the past two years and at the present time, has been on the tankers in foreign trade which substantially serve Atlantic Richfield and other refiners in Puget Sound. (A. 45, 57, 107-13) While Atlantic Richfield plans to supply its Cherry Point refinery with North Slope crude oil to the extent possible, for obvious reasons it cannot, in light of possible interruptions in the flow of North Slope oil, afford to be dependent on Alaskan crude as its sole source of supply. (See also A. 62-63) The availability of North Slope crude oil will not, in any event, affect the continuing dependence of the other Puget Sound refiners on foreign crude oil imports. See Federal Energy Administration, Equitable Sharing of North Slope Crude Oil, A Study Requested by Congress in Section 18 of the Alaska Natural Gas Transportation Act, at 12, 33, 70 (April 1977). Nor would this development affect the continuing exclusion of Seatrain's foreign flag tankers from Puget Sound. (A. 53)

economy and efficiency entailed by use of tankers over 125,000 DWT – 10% to 25% in the Alaska trade and up to 50% on longer foreign runs. (A. 63-64) It also seriously devalues the investments of hundreds of millions of dollars by Atlantic Richfield as well as Seatrain in tankers which exceed the Size Limit. (A. 53-55). In contrast, the State has conceded that there is good faith dispute whether use of tankers over 125,000 DWT poses any greater environmental risk than use of a larger number of smaller tankers. (A. 84) Alaska, in fact, has concluded that larger tankers pose the lesser risk. See n. 42 *supra*.<sup>52</sup>

The Tanker Law's Design Requirements and Tug Escort Proviso are equally invalid under the Commerce Clause. Washington's attempt to regulate indirectly the design and equipment of tankers – including substantial numbers of foreign tankers – by penalizing those which do not have the state-prescribed features likewise intrudes into an area when uniform national regulation is essential. The diversity of state design standards, if permitted, will force tanker operators to bear the expense of the tug escorts required by Washington, the tug escorts and risk charges imposed by Alaska, and similar charges yet to be imposed by other states, because they plainly cannot have separately designed fleets for every port.

<sup>52</sup> *South Carolina State Highway Dept. v. Barnwell Brothers*, 303 U.S. 177 (1938), does not support the validity of the Size Limit. In upholding state regulation of the weight and width of trucks, the Court relied upon its view that state regulation of the use of the state's highways was of local concern, particularly since the highways were built, owned and maintained by the state. See 303 U.S. at 187. The Court in *Barnwell* also based its decision on application of a "rational basis" test which has been discredited in subsequent Commerce Clause cases, e.g., *Bibb v. Navajo Freight Lines*, *supra*, at 529. As the Court stated in *Southern Pacific Co. v. Arizona*, *supra*, the national interest in the free flow of commerce "is not to be avoided by simply invoking the convenient apologetics of the police power." 325 U.S. at 780.

#### IV. THE TANKER LAW INTERFERES WITH EXCLUSIVE FEDERAL CONTROL OF FOREIGN AFFAIRS AND TREATY-MAKING

The Tanker Law is invalid because it materially interferes with federal power to make treaties, Const. Art. II, § 2, cl. 2, and the implicit federal power to conduct foreign affairs, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-19 (1936). Federal control over foreign affairs is exclusive and is not subject to interference by state laws which might frustrate foreign policy or create difficulties with foreign governments for which the nation as a whole would be held to answer. *United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Pink*, 315 U.S. 203, 232-33 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 63-68 (1941). Even in the absence of any applicable treaty, state laws which have a direct and potentially adverse impact on foreign relations or may impair the effective exercise of the nation's foreign policy are invalid. *Zschernig v. Miller*, 389 U.S. 429 (1968). *See also, Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).<sup>54</sup>

The United States has recognized the desirability of international solutions to oil spill prevention and has actively committed itself to efforts to reach international agreement on regulation of tanker design. *See p. 25-27 supra; see generally A. 92-94.*

It is true, as appellants point out, that the 1973 Marine Pollution Convention adopted by the IMCO Conference does not in terms restrict the right of the United States

<sup>54</sup> Appellants mistakenly rely on *Alaska v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed for want of jurisdiction*, 429 U.S. 806 (1976), for the proposition that state environmental regulations are constitutional despite their effect on foreign affairs. The court in *Bundrant* upheld state regulation of crabbing beyond the state's three-mile territorial limit only because the state stipulated that the regulations "will not be enforced against foreign nationals." 546 P.2d at 540.

to impose more stringent tanker design requirements. This controversial issue was left for resolution at the ongoing Law of the Sea negotiations. *See Hearings on the 1973 IMCO Conference on Marine Pollution before the Senate Committee on Commerce*, 93d Cong., 1st Sess., Ser. No. 93-52, at 6-12 (1973). But it is simply erroneous to assume, as appellants do, that unilateral tanker regulation by the United States is internationally accepted and without serious international repercussions. *See U.S. Coast Guard, Final Environmental Impact Statement, Regulations for U.S. Tank Vessels Carrying Oil in Foreign Trade and Foreign Tank Vessels that Enter the Navigable Waters of the U.S.*, at 77-79 (Nov. 12, 1976). On the contrary, Coast Guard Commandant Bender, Vice Chairman of the U.S. delegation, stated that it was "a central article of faith at the Conference . . . in abandoning inclusion of an article formally limiting unilateral action, that all nations would act responsibly in substantial conformance with the Convention provisions." *Hearings on the 1973 IMCO Conference, supra*, at 23.<sup>55</sup>

The Coast Guard's regulations for tanker design under the PWSA thus substantially conform to the standards established by the Marine Pollution Convention. The Coast Guard has emphasized the importance of avoiding unilateral U.S. action because it would "impede the ratification of the Convention by other nations", "encourage the proliferation of differing regulatory schemes imposed by individual nations," invite retaliatory actions by other nations, and otherwise adversely affect our foreign rela-

<sup>55</sup> Appellants' argument that the United States has consistently adhered to a policy that international treaties do not prohibit supplementary federal or state regulation of vessel design is without merit. Appellants rely principally on the International Convention for the Prevention of Pollution of the Sea by Oil (1954), but this treaty relates to tanker operational and discharge standards, not tanker design. In contrast, SOLAS does relate to vessel design and equipment, and precludes supplementary regulation of foreign flag vessels by compelling United States acceptance of foreign certificates of inspection.

tions. *Id.* at 23; see Coast Guard EIS at A. 215-20, 330-31. As the Coast Guard recently stated, unilateral action to prescribe tanker design standards “would inevitably destroy our power to improve maritime standards and practices on a global scale through international processes.” *Hearings on Recent Tanker Accidents, supra*, at 194; *see also, id.* at 14-17.<sup>56</sup>

The federal government is not barred from imposing more stringent design requirements than those contained in the Marine Pollution Convention. But such action can only be taken at the federal level. Our constitutional system does not allow initiatives by each of the individual states which would so directly and adversely affect federal control over foreign relations.<sup>57</sup>

The Tanker Law’s exclusion of foreign flag vessels over 125,000 DWT is fraught with serious international consequences, for reasons wholly apart from the Marine Pollution Convention. The United States has treaties

<sup>56</sup> The Carter Administration remains committed to seeking international agreement on tanker design standards. Recognizing that “[p]ollution of the oceans by oil is a global problem requiring global solutions,” President Carter has submitted the 1973 Marine Pollution Convention to the Senate for ratification, and has called for a special IMCO Conference (to be held in February 1978) to consider the adoption of the Administration’s proposals as international standards. 13 Weekly Comp. of Pres. Docs. 408 (1977). The Coast Guard has announced that its latest rulemaking proposals may be delayed pending “the outcome of current international negotiations directed at developing international standards of comparable scope.” 42 Fed. Reg. at 24868. *See also* 123 Cong. Rec. S.8741 (daily ed. May 26, 1977) (Statement of Secretary of Transportation Adams to the IMCO Council).

<sup>57</sup> The Washington Tanker Law prescribes design features such as double bottoms which were “voted down by a substantial majority” at the 1973 IMCO Conference. *Hearings on the 1973 IMCO Conference, supra*, at 5. The international sensitivity of such design proposals may be seen in the protests of twelve foreign governments to the minor deviations from international design norms taken by the Coast Guard. *See Hearings on Recent Tanker Accidents, supra*, at 194.

with many foreign nations which guarantee access of their vessels to our ports. For example, the Treaty of Friendship, Commerce and Navigation with Liberia—under whose flag sail many tankers over 125,000 DWT, including Atlantic Richfield’s three new 150,000 DWT tankers, *see n. 8, supra*, and most of the tankers over 125,000 DWT which called at Cherry Point prior to the Tanker Law (A. 113)—provides that Liberia “shall have liberty to freely come with [its] vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the [United States] which are or may be open to foreign commerce and navigation.” 54 Stat. 1739 (1938).<sup>58</sup>

The Tanker Law invades the field of foreign affairs and conflicts with United States treaty obligations in one final respect. By attempting to exclude or prescribe design requirements on tankers transiting Puget Sound on their way to Canadian refineries in the Vancouver area, the Tanker Law violates the right of innocent passage guaranteed by Articles 14 and 16 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606 (1964), and U.S. treaty obligations toward Canada contained in Article I of the Treaty with Great Britain in Regard to [the Canadian Boundary] Limits Westward of the Rocky Mountains, 9 Stat. 869 (1846) (navigation of the channels and straits between Vancouver Island and the American mainland shall “remain free and open to both parties”). The normal navi-

<sup>58</sup> The Secretary of Transportation concluded that the proposal of the State of Florida to ban from the Florida Straits large tankers headed for deepwater ports in the Gulf of Mexico would violate such United States treaty obligations. *Opinion Approving Application of Seadock, Inc., supra*, at F-3 to F-6.

The absolute exclusion of a certificated foreign vessel solely on the basis of size is also inconsistent with United States treaty obligations under SOLAS. The Tanker Law’s Design Requirements likewise raise substantial questions of conflict with SOLAS, *see p. 25, supra*, questions which must properly be addressed only at the federal level.

gational routes taken by such tankers require transit through Washington waters subject to the Tanker Law. (A. 64-66). There can be no dispute that the Tanker Law's exclusion of tankers over 125,000 DWT bound for Canadian ports would be a fundamental abridgment of this right. The right of innocent passage likewise precludes Washington's attempt to regulate vessel design and equipment. *See Art. 21, § 2, Informal Composite Negotiating Text, Third United Nations Conference on the Law of the Sea, A/CONF.62/WP.10* (July 15, 1977); S. Rep. No. 95-176, *supra*, at 21, 69.

#### **V. THE ELEVENTH AMENDMENT DOES NOT BAR A SUIT AGAINST STATE OFFICIALS TO ENJOIN THEIR ENFORCEMENT OF AN UNCONSTITUTIONAL STATE LAW**

The appellant state officials urge the Court to overrule *Ex parte Young*, 209 U.S. 123 (1908), the landmark case in which the Court held that a suit against state officials to restrain their enforcement of an unconstitutional state law was not a suit against the state for purposes of the Eleventh Amendment. The Court reasoned that such a suit does not present any challenge to the legitimate sovereignty of the state, and that a state official attempting to enforce an unconstitutional statute is engaging in an illegal act and thus obtains no immunity. *Id.* at 159-60.

This case does not present a proper occasion for the Court to reconsider *Ex parte Young*,<sup>59</sup> but even if it did, appellants suggest no reason why *Ex parte Young* should

<sup>59</sup> Even if suit against the defendant state officials were barred by the Eleventh Amendment, this suit is properly maintained against two appellants who are county officials, the prosecuting attorneys of Whatcom and King Counties. These appellants have not raised the Eleventh Amendment defense, either in this Court or in the court below. Nor would they be entitled to the protection of the Eleventh Amendment even if *Ex parte Young* were overruled, for it is well settled that the Eleventh

now be overruled. The principle established by *Ex parte Young* provides an essential means to test the validity of state enactments. This Court has never doubted its continuing viability. As the Court unanimously held in *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974), "since *Ex parte Young* . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." *See also Edelman v. Jordan, supra*, at 664; *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952). While commentators have occasionally criticized the reasoning of *Ex parte Young*, few have doubted the fundamental wisdom and importance of its holding. *See, e.g., Davis, Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 Cornell L.Q. 3, 36 (1954); 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3524, at 97 (1975).

Appellants' suggestion that *Ex parte Young* is limited to cases involving Fourteenth Amendment rights is frivolous. The rationale of *Ex parte Young* is based on the paramount authority of the entire federal Constitution, not just the Fourteenth Amendment; the Court expressly did not rest its decision on the contention that the Fourteenth Amendment "altered or limited the effect of the earlier [Eleventh] Amendment." 209 U.S. at 150. This Court has uniformly held the Eleventh Amendment inapplicable to suits against state officials seeking to enjoin enforcement of state statutes in reliance on claims under other provisions of the Constitution, *see, e.g., Georgia Railroad & Banking Co. v. Redwine, supra*.

Amendment does not bar a suit against a county or county officials. *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Griffin v. County School Board*, 377 U.S. 218 (1964); *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974). In any event, the King County Prosecuting Attorney affirmatively intervened in this action and thus waived any immunity to which he might otherwise be entitled.

(Obligation of Contracts Clause); *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966) (Commerce Clause), and has unhesitatingly assumed jurisdiction of innumerable actions against state officials involving claims similar to those raised by appellees here.

The fact that Atlantic Richfield may have been entitled to bring an action in the state courts for declaratory relief — though apparently not for the injunctive relief Atlantic Richfield also sought, and obtained, in federal court — is irrelevant to the Eleventh Amendment issue, which goes to the question of the federal courts' judicial power. As this Court held in *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972), "the availability of declaratory relief in [the state] courts on appellants' federal claims is wholly beside the point." *See also Zwickler v. Koota*, 389 U.S. 241, 248 (1967).<sup>60</sup>

Appellants also argue that the absence of an imminent, publicly-threatened prosecution for violation of the Tanker Law bars this suit, apparently suggesting the absence of a live case or controversy. However, "the present effectiveness in fact of the statutory obligation" imposed by the state law establishes a live controversy. *Lake Carriers' Ass'n v. MacMullan*, *supra*, at 507. A publicly-threatened prosecution has never been required. See *Ex parte Young*, *supra* at 163; *City of Altus v. Carr*, *supra*, 255 F. Supp. at 836-37. As a practical matter, there can be no doubt that appellants would have immediately taken action to enforce the Tanker Law had Atlantic Rich-

<sup>60</sup> There is no ambiguity in the Tanker Law or any question of interpretation that might avoid the constitutional issues raised, as would justify traditional judicial abstention. *See Douglas v. Seacoast Products*, *supra*, 45 U.S.L.W. at 4489 n. 4; *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973). Nor, in the absence of any pending state proceeding, is abstention under *Younger v. Harris*, 401 U.S. 37 (1971) and *Juidice v. Vail*, 45 U.S.L.W. 4269 (U.S. Mar. 22, 1977), appropriate here. *Lake Carriers' Ass'n v. MacMullan*, *supra*, at 509.

field chosen to violate its provisions rather than to seek judicial relief. Appellants specifically advised the three-judge court below that they would "continue to enforce the state statute" pending appeal from the court's declaratory judgment, unless enjoined. Letter of Charles B. Roe, Jr., Counsel for Appellants, to the Three-Judge Court, September 29, 1976.<sup>61</sup>

Finally, this Court has indicated that in determining whether a suit is brought against a state for purposes of applying the Eleventh Amendment, it is appropriate to look to the law of the state in question. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 463 (1945). Under Washington law, "when the constitutionality of a statute is challenged the action is not one against the state; rather, it is one against the named defendant individually . . .". *Hanson v. Hutt*, 83 Wash. 2d 195, 202, 517 P.2d 599, 604 (1974). It is singularly inappropriate for defendants to suggest that the Eleventh Amendment affords them immunity from suit in this Court when the Washington Supreme Court does not consider such a suit to be a suit against the State.

<sup>61</sup> Appellants also contend that there is no certainty of irreparable injury to plaintiffs here. This contention goes to the availability of injunctive relief, not to the Eleventh Amendment issue relating to the courts' judicial power. It is well established that Atlantic Richfield was not required to attempt to find an agent willing to risk criminal prosecution by violating the law in order to test it. *Ex parte Young*, *supra*, at 163-65. And the present impact of the Tanker Law on Atlantic Richfield's operations — excluding from Washington waters Atlantic Richfield's 150,000 DWT tankers and imposing unrecoverable tug escort costs on use of smaller tankers — was sufficient to justify the injunctive relief issued by the three-judge court. In any event, irreparable injury is not a prerequisite to declaratory relief. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

## VI. CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed.

Respectfully submitted,

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## APPENDIX\*

Of Counsel:

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LANE, POWELL,

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August 1, 1977

\* Copies of the originals of these documents have been filed with the Clerk to be available for the Court's inspection and have been served on the parties.

Each is a Coast Guard business record and the best available evidence of official Coast Guard actions, and is thus subject to judicial notice by the Court. Cf. Rule 201 of the Federal Rules of Evidence. Reference to the navigation charts in the Appendix Attachment shows that buoy "RB" referred to in § 14 of the Coast Guard December 3, 1976 letter, § 18 of the Coast Guard April 6, 1977 letter, and the February 22, 1977 VTS Watch Officer's Work Book, is at the entrance to Rosario Strait. Ferndale, Washington, is immediately adjacent to Cherry Point.

**DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD**

(SEAL)

Mailing Address

Captain of the Port  
U.S. Coast Guard  
Bldg. 1, Pier 36  
1519 Alaskan Way S.  
Seattle, WA 98134

16616  
3 December 1976

Olympic Steamship Co., Inc.  
1000 2nd Ave.  
Seattle, WA 98174

Attention: Mr. Warren Johnson

Dear Sir:

As confirmation of the points discussed in our meeting of 29 November 1976, related to the transit of LPG carriers to the Cal Gas facility, Ferndale, WA, the following requirements and/or restrictions will be imposed:

1. A conference will be held prior to each arrival of an LPG carrier to delineate all requirements. Participants will include representatives of the Coast Guard, ship's agent, and vessel operator. (After sufficient conferences have been held, as determined by the COTP, Seattle, the conferences will be scheduled on an "as necessary" basis.)
2. Not less than 10 days prior to the vessel's arrival, the facility or vessel's agent must submit to the COTP an application for a permit to handle dangerous cargo. (CG-4260)

3. An emergency contingency plan is required for use in the event of a spillage, leakage or any accident resulting in the discharge of product. A copy of this plan must be on file with the Captain of the Port.

4. Each foreign flag vessel concerned must possess a valid Letter of Compliance, issued by the Commandant, U. S. Coast Guard, for carriage of the specific product to be loaded or discharged.

5. All vessels must possess a Certificate of Financial Responsibility and be able to produce same upon demand.

6. The vessel's Master or Agent shall have the authority from the owner/operator to immediately enlist commercial assistance in an emergency situation or when so directed by the COTP, Seattle.

7. The loaded draft of the vessel shall be no greater than that which would permit safe navigation at mean low water.

8. The carrier, shipper, or agent must notify the COTP, Seattle 72 hours in advance of the ship's arrival at buoy "J". The time of arrival must be confirmed 10 hours prior to arrival at buoy "J".

9. The vessel shall proceed directly to the discharge terminal, discharge her cargo and depart without undue delay.

10. Continuous radio guard must be maintained on Channel 16 (156.8 Mhz) and Channel 13 (156.6 Mhz) while underway from buoy "J" to moorage.

11. The vessel shall be required to participate in the Strait of Juan de Fuca Traffic Separation Scheme from buoy "J" to the pilot station at Port Angeles. From the pilot station to her moorings the vessel shall participate in the mandatory Puget Sound Vessel Traffic Service.

12. Loaded vessels will transit from buoy "R" to moorage during daylight hours only. After discharge, an empty vessel may depart at anytime.

13. The LPG carrier shall be treated as a 75,000 dwt crude carrier for her transit of Rosario Strait, that is, there will be only one way traffic during her transit.

14. A tug escort is required for each LPG vessel from buoy "RB" to the Cal-Gas moorings.

15. The vessel shall be moored in such a manner as to permit getting underway on short notice.

16. Prior to handling cargo, the shore piping which is to be used in the operation shall be checked for proper operation of automatic controls, gas detectors, and instrumentation. If any part of the system contains air, it should be purged prior to handling the product by an inert gas or, in special circumstances, by low pressure LPG vapor. Care shall be taken in purging to minimize the volume of flammable mixture present at any time. Following purging, piping shall be gradually cooled to prevent thermal stress.

17. Insure that a qualified cryogenics supervisor is in attendance during all cryogenics cargo transfer.

18. A Coast Guard representative must be on scene during transfer operations.

19. The ship's Master, Cargo Officer, or Supervisor, as designated by the Master, must be on board throughout the entire discharge operation.

20. All equipment used in the vicinity of the transfer operation must be explosion proof.

21. All personnel directly involved in the transfer operation must speak English or a qualified interpreter must be present.

22. The dockman and the vessel's designated person-in-charge must be in constant communication with each other.

23. There shall be no other cargo transfers or vessel movements at the same facility during the transfer of LPG.

24. There will be no welding, hotwork, burning, smoking, open lights, or similar activity permitted while the vessel is alongside the terminal.

25. Upon completion of all cargo transfers, the product line from pier head to storage tank loading stations shall be unloaded into closed containers and not vented to the atmosphere.

If any further questions arise, feel free to contact me at the address or phone number above, or LT Morton or ENSIGN Nesel of my staff at 442-1853.

Respectfully,

RICHARD F. MALM  
Captain, U. S. Coast Guard  
Captain of the Port  
Seattle, Washington

copy to:  
CCGD13(m)  
PSVTS, Seattle

**DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD**

Mailing Address

(SEAL)

Captain of the Port  
c/o Coast Guard Group  
1519 Alaskan Way S.  
Seattle, WA 98134

16616  
6 April 1977

Olympic Steamship Co., Inc.  
1000 2nd Ave.  
Seattle, WA 98174

Attention: Mr. Warren Johnson

Dear Sir:

This letter supersedes my letter of 3 December 1976 and states the baseline requirements for any future shipments of Liquefied Petroleum Gas (LPG) to the California Liquefied Petroleum Gas (CALGAS) facility, Ferndale, WA. The following requirements and/or restrictions will be imposed:

- Prior to each arrival of an LPG carrier, a conference will be held to review standard requirements and delineate such additional requirements as may be necessary/appropriate. Participants will include representatives of the Coast Guard Captain of the Port, Seattle (COTP), ship's agents, vessel operator, and the Puget Sound Pilot's Association and such other parties as may be appropriate. (After sufficient experience has been gained, as determined by the COTP the conferences may be scheduled on an "as necessary" basis.)

2. The vessel's agents are responsible for the notification of all parties with an interest in the vessel's movement and operation, including, but not limited to the Puget Sound Pilot Association, Intaleo, tug operators, LPG vessel master, etc. Notification as used here, means *all* information relating to the arrival, transit, cargo discharge, departure and any other activity related to the LPG carrier. When notification is by record means a copy is to be furnished to the COTP as soon as practicable.

3. An approved Emergency Contingency plan is required for use in the event of a spill, leakage or any accident resulting in the discharge of product at anytime while in United States waters. A copy of this plan must be on file with the Captain of the Port, Seattle.

4. Each foreign flag vessel concerned, must possess a valid Letter of Compliance, issued by the Commandant, U. S. Coast Guard, for carriage of the specific product to be discharged.

5. All vessels must possess a Certificate of Financial Responsibility, issued by the Federal Maritime Commission, and be able to produce the same upon demand.

6. The vessel's Master or Agent shall have the authority from the owner/operator to immediately enlist commercial assistance in an emergency situation or when so directed by the COTP.

7. The loaded draft of the vessel shall be no greater than that which would permit safe navigation at mean low low water.

8. Not less than 10 days prior to the vessel's arrival, the facility or vessel's agent must submit to the COTP an Application and Permit to Handle Explosives or other Dangerous Cargo (CG-4260).

9. The carrier, shipper or agent must notify the COTP 72 hours in advance of the ship's arrival at Buoy "J".

The time for arrival must be confirmed 10 hours prior to arrival at Buoy "J".

10. Continuous radio guard must be maintained on Channel 16 (156.8 MHZ), Channel 13 (156.6 MHZ) and Channel 14 (156.7 MHZ) (on and after 1 July 1977) while underway or anchored between Buoy "J" and the discharge facility, or when anchored prior to arrival at the discharge facility.

11. The vessel shall participate in the Strait of Juan de Fuca Traffic Separation Scheme (TSS) from Buoy "J" to the pilot station at Port Angeles. From the pilot station to her moorings the vessel shall participate in the mandatory Puget Sound Vessel Traffic Service (PSVTS).

12. The vessel shall proceed directly to the discharge terminal, discharge her cargo and depart without undue delay.

13. In the event of high winds or storm conditions, the vessel's Master shall advise the COTP via PSVTS of the vessel's seaworthiness, ability to maneuver, navigate safely and/or any condition which could result in an undue hazard to the vessel, the surrounding environment and/or people and property within the potential sphere of action. If necessary the vessel will be directed to anchor in one of the following locations: Freshwater Bay or west of Cherry Point.

14. In the event of reduced visibility (visibility less than one NM) the LPG carrier shall not enter Rosario Strait until visibility has improved. If the vessel is in Rosario Strait and visibility decreases to less than one NM a manned radar navigation watch shall be set.

15. A Coast Guard Boarding Officer(s) will ride the vessel from Port Angeles to the vessel's moorings. The number of Boarding Officers will be determined at the meeting described in paragraph 1. The Coast Guard Boarding Officer(s) will conduct Letter of Compliance

inspections and pre-offloading checks to expedite cargo transfer. The Coast Guard Boarding Officers will not direct or control the movement of the LPG vessel.

16. The LPG vessel will transmit from Buoy "R" to her berth at Intaleo during daylight hours only. Daylight is defined as from the beginning of morning nautical twilight to the end of evening nautical twilight. The exact time will be determined at the meeting described in paragraph 1.

17. The LPG carrier *must* transit via Rosario Strait. Traffic will be managed so that she will not meet or overtake any other vessels during her inbound transit between Buoys "RB" and "C".

18. A tug escort is required for each LPG vessel from Buoy "RB" to the Cal Gas moorings. The tug shall be of sufficient size to assist the vessel in emergency situations. The LPG carrier *and* the tug must be rigged and manned so that a meaningful connection can be made between the two in a prompt, timely manner.

19. During the inbound transit the LPG carrier anchor shall be rigged and manned for letting go on short notice.

20. The vessel shall be moored in such a manner as to permit getting underway on short notice.

21. Prior to transfer, the shore piping which is to be used in the operation shall be checked for proper operation of automatic controls, gas detectors, and instrumentation. If any part of the system contains air, it should be purged prior to handling the product by an inert gas or, in special circumstances, by low pressure LPG vapor. Care shall be taken in purging to minimize the volume of flammable mixture present at any time. Following purging, piping shall be gradually cooled to prevent thermal stress.

22. Prior to transfer, all fire fighting equipment shall be checked for accessibility and operation.

23. A COTP representative will be on scene during all transfer operations. He has the authority to stop the transfer operation at any time, for cause.

24. A qualified cryogenics supervisor must be in attendance during all cryogenics cargo transfers.

25. The ship's Master, Cargo Officer or Supervisor, as designated by the Master, must be onboard throughout the entire discharge operation.

26. All equipment used in the vicinity of the transfer operation must be explosion proof. All deck scuppers shall be plugged.

27. Display a red flag (day) and red light (night) so that it will be visible from all directions at all times during transfer operations.

28. All personnel directly involved in the transfer operation must speak *and* understand English or a qualified interpreter must be present.

29. There shall be no other cargo transfers or vessel movement at the same facility during the transfer of LPG.

30. There will be no welding, hotwork, burning, smoking, open lights, or similar activities permitted while the vessel is alongside the terminal.

31. Upon completion of all cargo transfers the product line from pier head to storage tank loading stations shall be unloaded into closed containers and not vented into the atmosphere.

32. Upon offloading of all product, the vessel will depart without undue delay and proceed directly to sea. Daylight transit of Rosario Strait is not required of an outbound, empty LPG vessel.

If any further questions arise, contact me at the address or phone number above, or my Marine Safety or Port Safety Officers at 442-1853.

Respectfully,

RICHARD F. MALM  
Captain, U. S. Coast Guard  
Captain of the Port  
Seattle, Washington

Copy to:

CCGD13(m)  
PSVTS, Seattle  
MIO, Seattle  
Puget Sound Pilots Association  
PSD Anacortes

**[UNITED STATES COAST GUARD]  
VTS WATCH OFFICER'S WORK BOOK**

**22 Feb 77**

0000-0800

Relieved Lt. Young. Equipment as per CASREPT log. 29 vessels. **2350** [21 Feb] Sent initial msg concerning Valerie F. **0030** Informed Pilot Sta of plans for Valerie F. They don't know which pilot it will be yet, and whoever he is, he's asleep, so a note was left for him. **0115** Informed Valerie F of tug assist requirement. He seemed quite agreeable. Also told him winds were reported at this time to be 20-40 kts in Rosario. **0140** COTP OOD called to say CAPT Malm [Puget Sound Captain of the Port] agrees w/VTS "recommendation" concerning Valerie F, and that if there is any trouble, we can use his personal authority. **0545** Pilot has made arrangements for Stacey Foss to assist Valerie F, who has slowed down for rendezvous at [buoy] Rb approx 1000.

C. D. Main

0800-1600

Relieved Lt. Main. Eqp as per CASREP log. 27 vsls on plot. Generally high winds in sound/straits. Tug/Barge "Valerie F" transiting under special instructions not to transit Rosario without escort. Presently sitting at "RA" waiting for Stacey Foss. **0802** Stove Transport inbound at "J" for Victoria reports force 6 wx (from NNW) her cargo—packaged lumber—is loose on deck (no problem at present) vsl inbound to secure cargo. Advised COTP/RCC for info purposes.

K.R. Grover

DEPARTMENT OF  
TRANSPORTATION  
U.S. COAST GUARD  
CG-4380A (Rev. 8-67)

**LOG — REMARKS SHEET**

Vessel/Station	Zone Description	Day of Week	Date
USCG Port Safety Station	+8 (u)	Mon-Tue	21 0900(u) to 22 0900(u) Feb 77

**REMARKS**

**22 FEBRUARY 1977**

- 0020 Notified by VTC of integrated barge/tug Valarie F enroute Bellingham. Subject suffered casualty to starboard shaft. Due to lack of maneuverability and on scene weather, subject directed to have tug or wait until winds are less than 15 kts. Report passed to COTP Seattle.
- 0235 Received report of 14 foot boat adrift in vicinity of First Ave S. Bridge, Duwamish River. Intend to investigate in conjunction with search for pollution source in vicinity at first light 22 February 1977.
- 0819 CG 41388 u/w for Harbor Patrol. Coxswain directed to watch for boat reported adrift in the vicinity of the First Ave. S. Bridge and to conduct waterside survey of vicinity around Ex Atr-87 for possible pollution sources.
- 0820 Notified by reporting party that Dr. Scott had been located. Closed UCN 0222.

Supreme Court, U. S.  
FILED

OCT 22 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

OCTOBER TERM, 1977  
No. 76-930

DIXY LEE RAY, Governor of the State of Washington;  
SLADE GORTON, Attorney General of the State of Washington; JOHN C. HEWITT, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; DAVID S. MCEACHRAN, Whatcom County Prosecuting Attorney; CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney; COALITION AGAINST OIL POLLUTION; NATIONAL WILDLIFE FEDERATION; SIERRA CLUB; and ENVIRONMENTAL DEFENSE FUND, INC.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, and SEATRAIN LINES, INC.,

*Appellees.*

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cuting Attorney; COALITION AGAINST OIL POLLUTION;  
NATIONAL WILDLIFE FEDERATION; SIERRA CLUB; and EN-  
VIRONMENTAL DEFENSE FUND, INC.,

Appellants,

v.  
ATLANTIC RICHFIELD COMPANY, and SEATRAIN LINES, INC.,  
Appellees.

**REPLY BRIEF OF APPELLANTS**

I.

**INTRODUCTION**

Chapter 125 is a police power exercise designed to accommodate competing uses of Puget Sound and protect its natural resources from the risks of oil spills. Chapter 125 reduces those risks through its operative restrictions on oil tanker traffic in the confines of Puget Sound—a tug escort requirement and an access limit based on tanker size—without reducing the amount of oil processed in Washington. (A. 68). Chapter 125's objective of protecting the State's most valuable and sensitive estuary furthers the expressly stated congressional objective in the Ports and Waterways Safety Act ("PWSA") of pro-

tecting marine environments from destruction by oil spills.

The basic issue in this case is whether Congress in the PWSA clearly manifested an intention to forbid Washington State from enacting consistent, complementary legislation such as Chapter 125.

**A. The Federal And State Governments Are Pursuing The Same Objective—Protection Of Puget Sound.**

Chapter 125 applies only to that portion of Washington's marine waters identified as Puget Sound. Both the State and Congress have expressly recognized Puget Sound as a fragile and important estuary requiring special protection from the hazards of oil tanker traffic. In S. 1522 (amending Section 102 of the Marine Mammal Protection Act, 16 U.S.C. § 1372), 95th Cong., 1st Sess. (1977), which bans federal action that would increase the volume of crude oil handled at on-shore facilities on Puget Sound and which was signed by President Carter on October 18, 1977, Congress found:

(1) the navigable waters of Puget Sound in the State of Washington, and the natural resources therein, are a fragile and important national asset;

(2) Puget Sound and the shore area immediately adjacent thereto is threatened by increased domestic and international traffic of tankers carrying crude oil in bulk which increases the possibility of vessel collisions and oil spills; and

(3) it is necessary to restrict such tanker traffic in Puget Sound in order to protect the navigable waters thereof, the natural resources therein, and the shore area immediately adjacent thereto, from environmental harm.

Section 5(a). (S. 1522, Section 5, is reproduced in Appendix A to this reply brief.)

Senator Magnuson, the prime sponsor of S. 1522, specifically indicated that it was intended as a "clear federal endorsement" of the *State* policy of protecting Puget Sound from tanker traffic hazards. 123 Cong. Rec. 16228 (daily ed. October 4, 1977). Where the federal and State governments are working in complete harmony to reach the common goal of protecting a "major national environmental treasure," *id.*, there is no basis to find congressional preemption of State efforts to achieve that goal.

**B. The Solicitor General's Position Substantially Supports The Validity Of Chapter 125.**

In his brief, the Solicitor General correctly acknowledges that "Chapter 125 represents an exercise by the State of Washington of its police power." (U.S. Br. 10). The Solicitor General properly concludes that the PWSA neither expressly nor implicitly preempts the tug escort provision of Chapter 125. However, the Solicitor General concludes that Chapter 125's access limit is invalid primarily on the basis of an issue never raised in the lower court and not properly raised now before this Court, i.e., his contention that the 125,000 DWT limit has not been shown to be reasonably related to the State's purpose of preventing pollution from oil spills. He in effect asks the Court to second-guess the State legislature, which this Court has repeatedly refused

to do.<sup>1</sup> This new argument is discussed at pages 23 to 25, *infra*.

### C. ARCO Incorrectly Concludes That Chapter 125 is Preempted.

While ARCO does claim that the PWSA expressly preempts Chapter 125, ARCO's primary argument is a theory of implied preemption based upon allegations that (1) national uniformity is needed; (2) the field has been occupied by the Coast Guard; and (3) federally licensed ships are immune from state regulation.

ARCO asks this Court to deviate from its traditional approach in preemption cases of reconciling the operation of state and federal statutory schemes rather than ousting state regulation. ARCO urges the Court to construe Chapter 125 as conflicting with the PWSA and Coast Guard regulations promulgated thereunder when experience confirms that no conflict exists. It is uncontested that since the effective date of Chapter 125 in September of 1975, all oil tankers on Puget Sound have complied with both Chapter 125 and all federal regulations without any conflict or other problem whatsoever.

In addition, ARCO's brief fails to distinguish the two operative provisions of Chapter 125 from

<sup>1</sup> The position of the United States as reflected in the Solicitor General's brief is changed markedly from the position presented to the district court in the amicus brief prepared by the San Francisco office, Admiralty and Shipping Section, U.S. Department of Justice. Unlike the U.S. position in the lower court, the Solicitor General finds the tug escort provision valid and concludes that Congress did not expressly preempt Washington's access limit. Further, the Solicitor General does not find that Congress mandated exclusive federal regulation through the Coast Guard.

tanker design features. ARCO asks the Court to construe Chapter 125 as an attempt by the State to mandate tanker design standards. This claim ignores the fact that in the more than two years since Chapter 125 went into effect, *no* tanker has been kept out of Washington State waters because of any supposed design or equipment requirements.

## II.

### CONGRESS DID NOT EXPRESSLY PREEMPT CHAPTER 125.

ARCO argues that Title I of the PWSA, through Section 102(b), expressly preempts all state regulations relating to oil tanker movement, including Chapter 125. Such a reading of Section 102(b) is unwarranted. Neither the district court nor the Solicitor General found any express preemption of Chapter 125 through Section 102(b) or any other section of the PWSA. The clear and unequivocal declaration of exclusive federal authority which is required to preempt state regulation is not present in this case.<sup>2</sup> *De Canas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>2</sup> In fact, the portion of Section 102(b) relied upon by ARCO is an express preservation of state authority; it does not expressly prohibit any state activity. Consequently, ARCO is forced to attribute a negative inference to language in Section 102(b). ARCO attempts to bolster this attenuated argument by use of an ambiguous statement in the House Report (quoted at Brief of Appellants 39) and by pointing to several isolated statements by speakers at the House Hearing. (ARCO Br. 20). Examination of the Report and these comments reveals concern about state regulation of vessel equipment items, which are not requirements of Chapter 125.

ARCO's additional claim that Title II demonstrates preemptive intent is clearly wrong. Title II deals only with design and construction standards, contains no reference to preemption, and only authorizes the Coast Guard to set "minimum standards."<sup>3</sup> PWSA Section 201.

### III. CONGRESS DID NOT IMPLICITLY PREEMPT CHAPTER 125.

#### A. **The Regulation Of Local Tanker Traffic Does Not Require National Uniformity.**

ARCO's most emphasized argument is that state legislation such as Chapter 125 cannot stand because it runs afoul of a claimed need for nationally uniform regulation of tankers. However, since resolution of preemption claims involves the "sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties,"<sup>4</sup> this case cannot be resolved on the basis of a general or abstract "uniformity" claim. ARCO's

<sup>3</sup> ARCO's suggestion that "minimum standards" as used in Title II signifies congressional intent to allow the shipping industry to set higher environmental or safety construction standards is totally unsupported. (ARCO Br. 24-25). The PWSA was a response to the complete failure of the shipping industry to adopt any environmental measures. The evidence before Congress was undisputed that ships were being "built exclusively for the economic benefit of their owners" without regard for the environment, and Congress recognized that "much needs to be done" to remedy this situation. S. Rep. No. 92-724, 92d Cong., 2d Sess., 17 (1972) ("PWSA Senate Report"). Even the Coast Guard was unable to cite a single example of an environmental regulation promulgated by the American Bureau of Shipping, the group which promulgates industry standards. *Hearings on Navigable Waters Safety and Environmental Quality Act Before the Senate Commerce Committee*, 92d Cong., 1st Sess., ser. 92-39 at 39-41 (1971). Congress knew it could not rely upon the industry to set any standards exceeding the mandated "minimum standards."

<sup>4</sup> *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

uniformity argument fails because it does not examine the particular statutory provisions and problems involved.

#### 1. **Chapter 125 does not require design or construction standards.**

In its effort to argue a need for national uniformity, ARCO is compelled to mischaracterize Chapter 125 as imposing design or construction standards.<sup>5</sup> ARCO argues that Chapter 125 is preempted because design and construction standards must be uniform on a national or even international basis. However, as the Solicitor General recognized (U.S. Br. 34), Chapter 125 does not impose any design or construction standards. And ARCO by its own conduct since enactment of Chapter 125 has recognized that no such standards are required.

#### 2. **Rules for local waters must be diverse.**

The operative provisions of Chapter 125—tug escort and access limit—are the types of regulation which inherently must be tailored to diverse local conditions such as channel depth, width, tides, weather, and traffic. Congress itself recognized in the PWSA that national uniformity for tug escort or vessel size regulations would be inappropriate. PWSA Section 102(e); PWSA Senate Report at 33:

<sup>5</sup> ARCO also claims that Chapter 125's tug escort provision disrupts uniformity by "pressuring" tanker operators to incorporate Washington's alternative design features in their vessels. (ARCO Br. 32). As indicated in the record (A. 62, 67) and pointed out by the Solicitor General, the cost of tugs is so small compared to the cost of incorporating design features that there is no economic pressure to adopt those features. (U.S. Br. 36-37). For example, the Solicitor General notes that ARCO could pay tug fees for 50 years and still have paid only one-third of the cost of incorporating the design features into just one vessel. (U.S. Br. 36, n. 37).

H. R. Rep. No. 92-563, 92nd Cong., 1st Sess., 8 ("PWSA House Report"). Any variation in tug escort requirements or access limits between coastal states due to natural geographic or other local factors cannot be characterized as legislative "Balkanization." (ARCO Br. 46-47).

### **3. The Coast Guard is not the exclusive decision-maker for these diverse rules.**

Although ARCO suggests that nationally uniform regulation is needed for tugs and tanker size to avoid the "probability of proliferating state regulation" and "Balkanization" (ARCO Br. 47),<sup>6</sup> ARCO elsewhere in its brief concedes that tugs and access limits cannot be the subject of uniform rules. (ARCO Br. 30, 34-35). Ultimately, ARCO contends that Congress, through the PWSA, intended to transfer to the Coast Guard the authority to make the rules for all local waters and environments threatened by oil pollution from tankers, even though those rules would necessarily be different in each locality. Thus ARCO's claimed need for uniformity is not based on a concern for uniform substantive regulation of tug escorts or size limits but rather on a belief that only one agency should have authority to issue such regulations. (ARCO Br. 46-48). ARCO's position is inconsistent with more than one hundred years of state regulation and the express language of PWSA and other federal statutes.

<sup>6</sup> Contrary to ARCO's "Balkanization" claim, Alaska's tanker law does not "encourage rather than prohibit use of tankers over 125,000 DWT" (ARCO Br. 7-8). The only size related requirement of Alaska Stat. 30.20.010 *et seq.* (Supp. 1976) is the same as Chapter 125, i.e. tankers over 40,000 DWT must utilize tug escorts.

### **a. State police powers include regulation of vessel movement.**

ARCO's first "uniformity" argument in support of its claim that only the Coast Guard should regulate vessel movement is that states have never had an historic police power role over the matter and that the field has always been regulated uniformly by the federal government. (ARCO Br. 40). As recognized by the Solicitor General, such a view is unfounded. (U.S. Br. 10). For example, he states:

"The power to prescribe tug escort requirements is one traditionally within the competence of the states." (U.S. Br. 32)

As early as *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), state police power over navigable waters and vessel movement has been recognized.<sup>7</sup> Locally imposed tug escort requirements for vessels over a specified size and in specified areas have been upheld as a "needful and inherent" police power exercise. *Canada Atlantic Transit Co. v. Chicago*, 210 Fed. 7, 11 (7th Cir. 1913). There currently exists "massive legislation dealing with shipping matters" at the state level. Gilmore and Black, *Law of Admiralty*, 47-48 (2d ed. 1975). Coast Guard Commandant Bender acknowledged the shared federal-state control over vessels during hearings on the PWSA.

The primary concern for the *safeguarding of waterfront facilities and vessels has been and continues to be a matter of local concern*. This

<sup>7</sup> Brief of Appellants at 21-26 more fully discusses historic police power control of vessels, including the more recent cases of *Ashley v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Illinoian Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); and *Kelly v. Washington*, 302 U.S. 1 (1937).

legislation will in no way affect that primary responsibility. (Emphasis added).<sup>8</sup>

Contrary to ARCO's assertion, Chapter 125 is not a state intrusion into an area of exclusive federal authority. Rather, Chapter 125 is an exercise of local police powers to protect natural resources from vessel congestion in a hazardous area.

**b. Congress did not intend to grant exclusive authority to the Coast Guard.**

ARCO also argues in support of its "uniformity" claim that any state regulation, even if not in conflict with federal regulation, "necessarily disrupts" Coast Guard regulation. (ARCO Br. 28-29). ARCO's contention is unsupported by the PWSA and contradicted by the Coast Guard itself.<sup>9</sup>

The PWSA's express purposes are to protect the marine environment and improve vessel safety.<sup>10</sup> Sections 101 and 201. Nowhere in the Act does Congress state that uniformity is a necessary, or even

<sup>8</sup> Hearings on H.R. 17830, H.R. 18047, H.R. 15710 before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries, 91st Cong., 2nd Sess., ser. 91-34 at 17-18 (1970).

<sup>9</sup> ARCO attempts to compare the Coast Guard duties under the PWSA to the roles of the Federal Aviation Administration and the Atomic Energy Commission in order to rely on *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) and *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd mem. 405 U.S. 1035 (1972). Such reliance is misplaced. Both the FAA and the AEC by express statutory declaration had the competing, perhaps conflicting, responsibilities to promote an industry as well as regulate it. The Coast Guard has no such balancing responsibility. See Brief of Appellants at 43, n. 51, and at 56-57.

ARCO's citation to the Merchant Marine Act of 1970 as support for a Coast Guard role to promote the shipping industry is in error. (ARCO Br. 29, n. 29). The Maritime Administration, not the Coast Guard, is charged with promotion of the country's shipping industry.

<sup>10</sup> Congress underscored the "duty to place the protection of our environment above all other considerations" in authorizing the imposition of vessel requirements in Title II, 118 Cong. Rec. 22985, Introduction of Conference Report on H.R. 8140 in House, remarks by Congressman Pelly, June 28, 1972.

desirable, national purpose. Indeed, the word "uniform" never appears in the PWSA. Cf. *Campbell v. Hussey*, 368 U.S. 297 (1961).<sup>11</sup> Rather, Congress in the PWSA granted discretionary authority to the Coast Guard which, even if exercised, contemplated a continuing local activity. Section 102(e) specifically directs the Coast Guard, when determining the *need* for Coast Guard regulation, to consider existing local vessel traffic systems. Congress could not have intended that the Coast Guard be the exclusive regulator when Section 102(e) specifically contemplates the continued use of existing local systems.<sup>12</sup>

In addition, the Coast Guard does not regard itself as the sole agency with authority to regulate tanker traffic. Coast Guard Admiral Siler, as head of the agency responsible for administration of the PWSA, advised Congress this year:

*If the state wished to add on to the existing federal standard, rather than to conflict with it, say to require the use of tugs to address some particular local risks, and if that standard did not impede innocent passage, then the Coast*

<sup>11</sup> In *Campbell*, the Court found preemption under the Federal Tobacco Inspection Act, 7 U.S.C. § 511, where Congress expressly declared its purpose that "uniform standards . . . [are] imperative" and that the standards adopted by the federal agency shall be "the official standards of the United States." . . . " Id. at 299. No such statement of purpose is either expressly stated in or fairly inferred from the PWSA or its legislative history.

<sup>12</sup> As pointed out in Brief of Appellants at 38, at least ten local vessel traffic systems were in operation prior to the PWSA. The Coast Guard has not established any federal vessel traffic systems in most of these ports. ARCO's argument that only the Coast Guard can regulate would require dismantling these safety systems without even attempting to replace them.

*Guard would support that action.* (Emphasis added).<sup>13</sup>

The Coast Guard's own statement refutes the notion that any additional state regulation necessarily disrupts Coast Guard regulation.<sup>14</sup>

**c. The Coastal Zone Management Act process, as implemented in Washington, confirms state authority to address oil tanker movement in coastal waters.**

The Coastal Zone Management Act of 1972, 16 U.S.C.A. §§ 1451 *et seq.* ("CZMA") further rebuts ARCO's contention that a national policy of uniformity is dictated for regulation of the nation's coastal waters. Congress has established through the CZMA a joint federal-state mechanism which allows coastal states to develop comprehensive "management programs" tailored to their particular demands and needs for the regulation of all uses within the coastal zone. 16 U.S.C.A. §§ 1453 (11) and (16), 1454(b).<sup>15</sup>

<sup>13</sup> Hearings on Recent Tanker Accidents Before the Senate Commerce Committee, 95th Cong., 1st Sess., ser. 95-4, 463 (1977). ("Tanker Accident Hearings").

<sup>14</sup> ARCO's claim that Admiral Siler's statement is "ambiguous" is wishful thinking. (ARCO Br. 36). Admiral Siler indicated both that tugs were appropriate responses to local conditions and that they could be required by states without disrupting any uniformity through exclusive Coast Guard regulation.

<sup>15</sup> In explaining the CZMA legislation to the Senate Committee on Commerce, then chairman of the Council on Environmental Quality, Russell Train, stated:

[W]e do not try to tell a state that "your plan must conform to what your neighbor does." We think that would be an interference with the state prerogatives.

*Legislative History of the Coastal Zone Management Act of 1972, as amended, at 106 (1976).*

Contrary to ARCO's contention that there is a federal policy of uniformity under present federal statutes, the CZMA fosters a policy of diversity, where necessary, to protect the nation's coastal waters from environmental harm.

Further, it should be noted that development and approval of state management programs must account for national as well as state interests. 16 U.S.C.A. §§ 1451; 1452; 1455(c)(1) and (8); 1456.

National policies for the state's coastal zone are established by federal approval of a state coastal management program.

The central feature of a state's program is the:

definition of what shall constitute permissible land uses and *water uses* within the coastal zone. \* \* \*

16 U.S.C.A. § 1454(b) (2). (Emphasis added).

The "coastal zone" extends "seaward to the outer limit of the United States territorial sea" and includes all of the waters of Puget Sound. 16 U.S.C.A. § 1453(1). The "water uses" in this zone subject to regulation through the program are defined broadly and include transportation of oil on the water:

"Water use" means activities which are conducted in or on the water. \* \* \*

16 U.S.C.A. § 1453(16).<sup>16</sup> "Transportation and navigation" are among the competing uses of the coastal zone expressly recognized by the CZMA as proper subjects of the state management program. 16 U.S.C.A. § 1451(e).

The application of the CZMA to Chapter 125 is direct. On June 1, 1976, then Secretary of Commerce Elliott Richardson approved the management program for the State of Washington. Ex. BBB. The approved program represents the national use regula-

<sup>16</sup> Congress invited states to play a strong role in addressing activities on the nation's coastal waters:

The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone. \* \* \* 16 U.S.C.A. § 1451(h). (Emphasis added).

tion—or zoning policy—for all coastal waters of the State including Puget Sound.<sup>17</sup>

Northern Puget Sound was singled out in the Washington program as an “area of particular concern” within the coastal zone due to oil tanker traffic. 16 U.S.C.A. § 1454(b)(3); Ex. AAA, 12, 17. The Washington program identified Chapter 125 as one of the “means by which the state proposes to exert control” over oil transportation on its waters.<sup>18</sup> The program states:

In recognition of the potential impacts of Alaska North Slope Oil on Puget Sound and the Strait of Juan de Fuca, the Washington State Legislature has taken several steps to prepare for spill threats to the state's inland marine waters.

\* \* \*

Further, the 1975 Legislature passed [Chapter 125], which provides for safety standards and prohibits tankers larger than 125,000 dead-

<sup>17</sup> Upon approval of state management programs, federal activities are to be conducted in accordance with the consistency provisions of the CZMA:

(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. \* \* \* No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification. \* \* \*

16 U.S.C.A. § 1456(c).

<sup>18</sup> The CZMA requires that states include in their management programs:

(4) An identification of the means by which the state proposes to exert control over the land uses and water uses referred to in paragraph (2), including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions.

16 U.S.C.A. § 1454(b)(4). (Emphasis added).

weight tons from entering Puget Sound and the Strait of Juan de Fuca beyond a point east of the Dungeness Lighthouse. The prohibition is currently being appealed as unconstitutional by a major oil company.

Ex. AAA, 17-18.

Chapter 125 is, as a matter of law, part of the federally-approved coastal zone program for Washington.<sup>19</sup>

Appellants do not contend that the approval by the Secretary of Commerce of Chapter 125 in itself mandates a declaration of the statute's constitutionality. Appellants do contend, however, that the CZMA reveals a congressional intent to allow the State of Washington to protect its coastal resources in a manner which may differ from the management programs of other states. Further, the implemented CZMA program establishes a national policy of permitted uses for the waters of Washington's coastal zone. State policy is now federal policy.<sup>20</sup>

ARCO's claim that the PWSA or some obscure

<sup>19</sup> ARCO relies on an affidavit of Mr. Robert Knecht, a subordinate of the Secretary of Commerce, in contending that Chapter 125 is not part of Washington's approved coastal zone program. (ARCO Br. 44) Secretary of Commerce Elliott Richardson's "Certificate of Approval" for the Washington program (Ex. BBB) is an official statement of approval. The Certificate of Approval speaks for itself and cannot be contradicted by parol evidence. *White v. Federal Deposit Insurance Corp.*, 122 F.2d 770 (4th Cir. 1941), cert. den., 316 U.S. 672 (1942).

Further, no state program can be submitted or approved unless it contains all state statutes regulating the identified competing uses of the coastal zone. Chapter 125 was a necessary element of the program approved by the Secretary of Commerce. 16 U.S.C.A. §§ 1454(b)(4); 1455(d).

<sup>20</sup> According to its prime sponsor, Senator Magnuson, S. 1522 (discussed *supra* at 2-3) was enacted to endorse Washington State's policy in its coastal zone management program of protecting Puget Sound from oil tanker traffic hazards and precluding location of oil transshipment facilities in Puget Sound. 123 Cong. Rec. 16226 (daily ed. Oct. 4, 1977).

national policy requires uniformity through exclusive Coast Guard regulation cannot be reconciled with the CZMA.<sup>21</sup>

#### B. Chapter 125 Is Not Preempted By Coast Guard Implementation Of Tanker Regulations.

ARCO also asserts that Chapter 125 is implicitly preempted because the Coast Guard "has fully implemented its regulatory powers" over all aspects of tanker safety, including Chapter 125's operative provisions of tug escort and access limit. (ARCO Br. 14).

This argument is based upon a misunderstanding of the doctrine of implied preemption. Preemption can be found only if Congress evidenced a "clear and manifest purpose" to make the PWSA the exclusive means of protecting local harbors from the risks of oil tanker movement. The actions of the Coast Guard alone cannot demonstrate congressional preemptive intent, as ARCO suggests. *De Canas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Furthermore, the Coast Guard has not implemented comprehensive regulations. Those regulations which have been adopted do not, as evidenced by two years of experience, conflict with the opera-

<sup>21</sup> ARCO argues that Chapter 125 upsets an exclusive "balancing" role for the Coast Guard under the PWSA. (ARCO Br. 28-29). To the contrary, the federal statute which establishes the mechanism for a balancing of all competing demands for use of the nation's coastal zone is the CZMA. The PWSA was never intended for such a role; it deals with regulation of only one of many uses in the nation's coastal waters.

tive provisions of Chapter 125.<sup>22</sup> As the Court pointed out in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973), resolution of the question of any conflict between state and Coast Guard Regulations "should await a concrete dispute" between the two.

ARCO's claim that the Coast Guard has "fully implemented" its power regarding tug escorts on Puget Sound is greatly exaggerated, based as it is on two isolated situations, neither involving oil tankers subject to Chapter 125.<sup>23</sup> ARCO's claim that the Coast Guard has established an access limit on Puget Sound is also unsupportable.<sup>24</sup> In fact, neither tug escorts nor access limits were even considered by the Coast Guard as part of the rule-making procedure establishing the vessel traffic system for Puget Sound.<sup>25</sup>

<sup>22</sup> Even assuming that Coast Guard regulations were to be extended far beyond their present limited scope, preemption is not to be inferred merely from "comprehensive" regulations. *New York Department of Social Services v. Dublino*, 413 U.S. 405, 415 (1973). See Brief of Appellants at 41-44.

<sup>23</sup> The Coast Guard District Commander has ordered liquefied petroleum gas (LPG) vessels to use tug escorts in Puget Sound, undoubtedly for the same important safety reasons Chapter 125 requires such escorts for oil tankers. The Coast Guard also ordered one disabled barge of unknown size to use a tug escort in an emergency. (ARCO Br. appendix at A-3, A-12). Based on this, ARCO argues in effect that states are preempted from sending tugs to assist vessels under any circumstances because the Coast Guard has done so in one case. (ARCO Br. 15).

<sup>24</sup> ARCO's statement that the Coast Guard in the Puget Sound vessel traffic system ("VTS") has established size regulations is a misrepresentation. (ARCO Br. 14, 30). There is no size or access regulation in the VTS, 33 C.F.R. Part 161, Subpart B (1974) (A. 141-153), or in any written rule or regulation. The Coast Guard Operating Manual (A. 155-198) simply encourages one-way traffic in Rosario Strait and contains no reference to size limits. (A. 184). Although the Pre-Trial Order states that the Coast Guard applies this informal one-way policy to tankers greater than 70,000 DWT (A. 65), this practice is not based on any written regulation and, in any event, is not a "size regulation" for Puget Sound.

<sup>25</sup> 38 Fed. Reg. 21227 (August 6, 1973); 33 C.F.R. Part 161 (1974); Public Docket, CGD 73-158 PH, Coast Guard Headquarters, Washington, D.C.

ARCO itself acknowledges that the Coast Guard has not promulgated general tug escort or vessel size regulations. (ARCO Br. 30, 36). Although on May 6, 1976, the Coast Guard solicited comments from the public on the general concept of tug escorts, the Coast Guard has not done anything to adopt regulations comparable to Chapter 125. 41 Fed. Reg. 18770. Over 15 months have elapsed since the last public comment on this matter, and the Coast Guard has made no public decision or statement, let alone proposed any regulations, on the subject.<sup>26</sup>

Conceding the Coast Guard has not acted on tug escorts and access limits for oil tankers on Puget Sound, ARCO ultimately argues that the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate." (ARCO Br. 30). ARCO's argument is without justification.

Significantly, ARCO does not cite any evidence that Congress intended that failure of the Coast Guard to act would be preemptive. As recognized by this Court and others, mere failure to act is not considered preemptive. *See, e.g., California v. Zook*, 336 U.S. 725 (1949); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939); *Chrysler Corp. v. Tofany*, 419 F.2d

<sup>26</sup> The Coast Guard is not "implementing" tug escorts "on a nationwide basis" as ARCO claims. (ARCO Br. 34). The May 6, 1976 notice was an "advance notice of proposed rulemaking" which solicited comments because the Coast Guard was "considering \* \* \* minimum standards." (Emphasis added). ARCO's reference to 42 Fed. Reg. 5956 (January 31, 1977) as proof that rulemaking will occur "in the near future" is a misstatement. (ARCO Br. 15). Rather, 42 Fed. Reg. 5956 refers to the possibility of imposing various vessel equipment requirements on tug boats themselves and is unrelated to tug escorts for tankers.

499 (2d Cir. 1969).<sup>27</sup> Further, even express rejection by a federal agency may not preempt state authority. For example, in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), the Court found no preemption of state regulation even though the Secretary of Agriculture expressly rejected adoption of the specific standards adopted by the state. 373 U.S. at 141. Finally, ARCO's reliance upon *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947), is misplaced. The actions of the NLRB in exercising its authority to hear cases cannot be compared with failure of the Coast Guard to adopt regulations; in *Bethlehem*, the NLRB had affirmatively established a policy that it would not exercise its jurisdiction in numerous identical cases. The Court specifically indicated that where the federal agency has failed to act, "the states are in those cases permitted to use their police power. \* \* \*" 330 U.S. at 774.

In this case, the Coast Guard has not considered tug escorts or access limits for Puget Sound, much less made any affirmative determination that such regulations are inappropriate. More importantly, ARCO cannot show that Congress intended that, if

<sup>27</sup> Failure to act can be caused by many factors unrelated to the desirability or need for regulation. For example, the Coast Guard has not installed radar surveillance equipment for the Puget Sound VTS in Rosario Strait even though it believes such equipment is urgently needed and should be installed as soon as funds are available. *Hearings on Vessel Traffic Control before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 94th Congress, 1st Sess., ser. 94-39 (1975). ARCO's argument would lead to a conclusion that the Coast Guard's failure to install radar in Rosario Strait is a decision that radar is not necessary there, which plainly is not the case.

any such determination were ever made, it would be preemptive.

ARCO's claim that the Coast Guard has "fully implemented" its authority also overlooks the limited nature of Coast Guard regulation on Puget Sound. This regulation leaves room for consistent state laws. The Coast Guard's rudimentary traffic system for Puget Sound consists of separated traffic lanes in some areas and periodic radio reporting by vessels. (A. 156).<sup>28</sup> The recent case of *Beeson v. Atlantic-Richfield Co.*, 88 Wn.2d 499, 563 P.2d 822 (1977), illustrates the failure of Coast Guard regulations to respond to all of the hazards presented by tanker traffic on Puget Sound. In *Beeson*, a commercial fisherman recovered damages when the ARCO tanker *Atlantic Endeavor*, while operating in the Coast Guard VTS, collided with the fishing equipment of at least three commercial fishing vessels at Rosario Strait.<sup>29</sup>

In sum, Chapter 125's tug escort requirements and access limit are intended to protect Puget Sound waters from the risks of oil spills and complement the

<sup>28</sup> There are no separated traffic lanes in the most dangerous areas, such as Rosario Strait, where the channel is so narrow that there is not room for two lanes. (A. 184).

Even ARCO has admitted that current Puget Sound VTS regulations are incomplete. See Statement of Charles M. Lynch, Vice President of Marine Transportation for ARCO, *Tanker Accident Hearings*, part 2 at 946 (1977).

<sup>29</sup> Even though the tanker was operating in the Coast Guard VTS and the "weather was clear, visibility was good, and there was adequate daylight," the tanker collided with equipment in both the north and south bound traffic lanes before managing to extricate itself from the area. 88 Wn.2d at 532, 563 P.2d at 824. Despite awareness of the presence of fishing vessels, the ARCO captain issued instructions to proceed and told the state pilot not to worry "because Arco would pay for any damage" (88 Wn.2d at 510, 563 P.2d at 828), an implicit rejection of his employer's "shallow pocket" argument put forward here. (ARCO Br. 39).

Coast Guard VTS in precisely the manner Congress contemplated in the PWSA.<sup>30</sup>

**C. Chapter 125 Does Not Conflict With Federal Vessel Registration, Enrollment Or Licensing.**

**1. Chapter 125 is an even-handed environmental regulation.**

ARCO and the Solicitor General contend that the 125,000 DWT access limit is an invalid restriction on federally enrolled and licensed vessels under the authority of *Gibbons v. Ogden*, 22 U.S. (9 Wneat.) 1 (1824).<sup>31</sup> (ARCO Br. 52-53; U.S. Br. 38-39). However, *Gibbons* does not stand for the proposition that all state laws which restrict federal vessels are prohibited. That the possession of a federal license does not immunize a vessel from state regulation is well established. See, e.g., *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 447 (1960); *Smith v. Maryland*, 59 U.S. (18 How.) 71

<sup>30</sup> As noted *supra* at 11-12, the Coast Guard has stated that it supports complementary state regulations such as tug escort requirements.

<sup>31</sup> ARCO also argues that Chapter 125 "effectively revokes" a certificate of inspection or compliance issued under the Tank Vessel Act. (ARCO Br. 51). ARCO overstates the nature of these certificates. The certification of tank vessels by the Coast Guard merely indicates that some of the vessel's equipment complies with marine inspection laws and regulations. 46 C.F.R. 31.01-1(a). As indicated in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), a federal certificate, like a federal license, does not exempt vessels from valid state and local environmental and health regulations.

ARCO and the Solicitor General also contend that Chapter 125's 125,000 DWT access limitation stands as an obstacle to the Maritime Administration's MARAD program promoting American shipbuilding. (ARCO Br. 55-56; U.S. Br. 42-43). This argument is without factual basis. Two-thirds of the tankers which have been constructed or are on order under the MARAD program are under 125,000 DWT. (A. 60). The use of these tankers is unaffected by the access limit. The smallest MARAD tankers over 125,000 DWT are 225,000 DWT vessels with a draft well in excess of 60 feet (A. 80), which substantially exceeds the controlling depth of Rosario Strait (A. 65) and all oil refinery docks on Puget Sound. (A. 47-48, 113).

(1855). This principle was recently repeated in *Douglas v. Seacoast Products, Inc.*, 97 S. Ct. 1740, 1747-48 (1977):

States may impose upon federal licensees reasonable, non-discriminatory conservation and environmental protection measures otherwise within the state police power.

Chapter 125 is such a conservation and environmental measure.

ARCO's reliance on *Gibbons* is misplaced. *Gibbons* invalidated a system of discriminatory treatment created by a "monopoly law [which] allowed some steam vessels to ply their trade while excluding others that were federally licensed." *Douglas, supra*, at 1747.

Likewise, ARCO mistakenly relies on *Douglas*. The Court in *Douglas* struck down a state law which discriminated against non-resident federal licensees. The Court found that the state statute had no legitimate conservation purpose and in effect was an attempt at economic protection of its residents from out-of-state competition.<sup>32</sup> The Court held that 46 U.S.C. § 251, the principal section relied upon by ARCO, entitled federal licensees "to the same 'privileges' of fishery access as a State affords to its residents or citizens." *Id.* at 1750. It was within this context of discriminatory treatment that the Court stated, "no State may completely exclude federal li-

<sup>32</sup> No challenge is made to the conservation and environmental purposes of Chapter 125, and no claim is made that Chapter 125 in any manner is an effort to suppress competition.

censed commerce."<sup>33</sup> *Id.* at 1751 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142).

Since Chapter 125 does not distinguish, let alone discriminate, based on ownership or licensing status, it cannot be attacked as discriminatory.<sup>34</sup> Chapter 125 is an impartial, "[e]venhanded local regulation to effectuate a legitimate local public interest." *Huron, supra*, 362 U.S. at 443. See also, *Manchester v. Massachusetts*, 139 U.S. 240, 265 (1891).

**2. The Solicitor General's claim that the access limit is not reasonably related to Chapter 125's objectives is unwarranted.**

The Solicitor General recognized Chapter 125 as a police power exercise by the State of Washington (U.S. Br. 10) and found no preemption of the tug escort provision. (U.S. Br. 18). He argues, however, that the 125,000 DWT access limit is invalid because that limit "has not been shown to be

<sup>33</sup> Of course, federally licensed commerce may be excluded by valid police power regulation. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

<sup>34</sup> ARCO's suggestion that Chapter 125 may be discriminatory because it applies uniformly to both interstate and foreign tankers is incomprehensible. (ARCO Br. 53). Chapter 125 applies to all tankers, including intrastate vessels.

ARCO and the Solicitor General further suggest that Washington's access limit based on size may be invalid because it is based on the "characteristics of the vessel itself" (ARCO Br. 53) or because it applies to a "class" of vessels, i.e. those vessels over 125,000 DWT. (U.S. Br. 38). The legal theory for this is unclear and no citations are given. Vessel size is clearly a proper basis for regulation, as recognized by Congress in the PWSA. Sections 101(3)(iii) and 102(e). Similarly, this Court recognized the propriety of transportation regulation based on size. *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938). To the extent these claims are a disguised argument that the particular size chosen by the State legislature is not reasonable, this new issue is discussed in the following section.

reasonably related to the State's avowed purpose of protecting Puget [sic] Sound from oil spills." (U.S. Br. 39).<sup>35</sup>

The reasonable relationship between the objectives of Chapter 125 and the means selected to achieve those objectives has never been challenged by ARCO. All parties entered into a lengthy Pre-Trial Order (A. 39-96) which framed the "issues of fact and law" and set forth the facts "agreed upon" for purposes of this litigation. The reasonableness of the access limit is neither a legal nor a factual issue in this case. See Pre-Trial Order, ¶s 119, 155-161. (¶s 155-161 are reproduced as Appendix B to this reply brief.) In addition, the district court did not consider the issue and the matter is not, therefore, appropriate for consideration by this Court. See, e.g., *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Furthermore, the Solicitor General asks this Court to second-guess a state legislature, which the Court has repeatedly refused to do. As stated in *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976):

[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. \* \* \*

*See also Hughes v. Alexandria Scrap Corp.*, 426 U.S.

<sup>35</sup> By claiming that the size limit is unreasonable, (U.S. Br. 38-39), the Solicitor General attempts to avoid the principle repeated in *Douglas, supra*, that states may impose "reasonable, non-discriminatory" environmental measures on federally licensed vessels.

794, 812 (1976); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

Where, as here, a good faith dispute exists as to the efficacy of the 125,000 DWT access limit (A. 84), it is the legislature's role to resolve it.<sup>36</sup> For example, in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad*, 393 U.S. 129, 134-135 (1968), the railroads asked the Court "to determine as a judicial matter that [full crew] laws no longer make a significant contribution to safety." The Court there upheld the state's judgment on its law's safety benefits even though "[t]he evidence as to the need for firemen and other additional crewmen was certainly conflicting and to a considerable extent inconclusive." *Id.* at 136. The Court found that the district court, which concluded that the law had no substantial effect on safety and that any slight increase in safety was not worth the additional cost to the railroad, "indulged in a legislative judgment wholly beyond its limited authority." *Id.* at 136.

<sup>36</sup> In any case, there is considerable support in the record for the 125,000 DWT limit in addition to ¶ 119 of the Pre-Trial Order. (A. 84). First, Alyeska Pipeline Service Company, owned in part by ARCO, told Congress that "the largest vessel to be used in the Valdez-Puget Sound trade will be 120,000 DWT." *PWSA Senate Hearings* at 415. Thus, the access limit accommodates what were stated to be the largest vessels which would enter Puget Sound with Alaskan oil. Second, the 125,000 DWT limit responds to topographic and other conditions of Puget Sound. For instance, five of the six refineries on Puget Sound cannot even dock a tanker greater than 125,000 DWT. (A. 47-48, 80). Rosario Strait, along the tanker route, is not only one of the narrowest shipping channels in Puget Sound, but also has a depth in portions of only 60 feet. (A. 65, Ex. G.).

## CONCLUSION

Based on the foregoing and on the Brief of the Appellants, we request that the Court reverse the decision below. Chapter 125, which helps to prevent the occurrence of disastrous oil spills and to preserve the special waters of Puget Sound, is an important and reasonable state measure of environmental protection which Congress has neither expressly nor implicitly preempted by the PWSA or by any other statute. Chapter 125 should be sustained.

DATE: October 21, 1977.

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## APPENDIX A

**S. 1522, Section 5 (Amending Section 102 of the  
Marine Mammal Protection Act. 16 U.S.C. § 1372),  
95th Cong., 1st Sess. (1977).**

(a) The Congress finds that—

(1) the navigable waters of Puget Sound in the State of Washington, and the natural resources therein, are a fragile and important national asset;

(2) Puget Sound and the shore area immediately adjacent thereto is threatened by increased domestic and international traffic of tankers carrying crude oil in bulk which increases the possibility of vessel collisions and oil spills; and

(3) it is necessary to restrict such tanker traffic in Puget Sound in order to protect the navigable waters thereof, the natural resources therein, and the shore area immediately adjacent thereto, from environmental harm.

(b) Notwithstanding any other provision of law, on and after the date of enactment of this section, no officer, employee, or other official of the Federal Government shall, or shall have authority to, issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on, or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, which will or may result in any increase in the volume of crude oil capable of

being handled at any such facility (measured as of the date of enactment of this section), other than oil to be refined for consumption in the State of Washington.

## APPENDIX B

**Section IV of Pre-Trial Order (Issues of Law, paragraphs 155-161)****IV. ISSUES OF LAW**

155. Does the Eleventh Amendment to the United States Constitution preclude this Court's jurisdiction?

156. Does H.B. 527 invade a field of regulation which has been preempted by the federal government and thus violate the Supremacy Clause of the United States Constitution, Article VI, Clause 2?

157. Does H.B. 527 impermissibly conflict with federal statutes and regulations and thus violate the Supremacy Clause of the United States Constitution, Article VI, Clause 2?

158. Does H.B. 527 unduly burden interstate and foreign commerce, *i.e.*, does H.B. 527 impermissibly impede the free flow of interstate and foreign commerce and thus violate Article I, Section 8, Clause 3 of the United States Constitution?

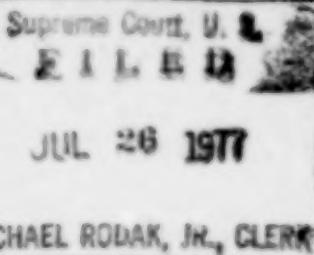
159. Does H.B. 527 invade a field of regulation where national uniformity is essential and thus violate the interstate and foreign commerce clause, Article I, Section 8, Clause 3, of the United States Constitution?

160. Does H.B. 527 invade a field of regulation where international agreement and cooperation have primacy and thus impermissibly interfere with exclusive federal power to regulate foreign affairs, to

regulate foreign commerce (Article I, Section 8, Clause 3) and to make treaties (Article II, Section 2, Clause 2)?

161. Does H.B. 527 impermissibly conflict with international agreements to which the United States is a party and thus violate the Supremacy Clause of the United States Constitution, Article VI, Clause 2?

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No. 76-930

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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DIXY LEE RAY, GOVERNOR OF THE STATE  
OF WASHINGTON, ET AL., APPELLANTS  
*v.*  
ATLANTIC RICHFIELD COMPANY, ET AL.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-930

DIXY LEE RAY, GOVERNOR OF THE STATE  
OF WASHINGTON, ET AL., APPELLANTS

v.  
ATLANTIC RICHFIELD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to file a brief on behalf of the United States as *amicus curiae*.

QUESTION PRESENTED

The United States will discuss the question whether Chapter 125 of the 1975 Laws of Washington is pre-empted by the Ports and Waterways Safety Act of 1972, and other federal statutes.

(1)

**STATEMENT**

Atlantic Richfield Company ("ARCO") brought this suit in the United States District Court for the Western District of Washington, naming as defendants the Governor and other officials of the State of Washington and seeking to enjoin enforcement of Chapter 125 of the 1975 Laws of Washington, Revised Code of Washington Annotated, § 88.16.170 *et seq.* (1976) (A. 97-101).<sup>1</sup> That statute requires all oil tankers—American or foreign flag (A. 44)—of 40,000 or more deadweight tons ("DWT") that do not conform to certain design and construction standards to take on tug escorts when navigating Puget Sound (Section 3(2)); it requires, in addition, that oil tankers of 50,000 or more DWT take on a state-licensed pilot when navigating the Sound (Section 2); and it prohibits oil tankers of more than 125,000 DWT from entering the Sound under any circumstances (Section 3(1)).

1. In 1971 ARCO built and began operating an oil processing refinery at Cherry Point in Puget Sound (A. 41, 44-45). The crude oil processed at the refinery has been delivered principally by pipeline from Canada and by tankers from the Persian Gulf (A. 41, 45). Ninety-five of the 105 tankers that have called at

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<sup>1</sup> After the complaint was filed, Seatrain Lines, Inc., intervened as a party plaintiff; several environmental organizations and the Prosecuting Attorney for King County, Washington, intervened as parties defendant. A pretrial order entered April 6, 1976, embodies the parties' stipulation of uncontested facts and issues of law presented (A. 39-359).

Cherry Point have been in excess of 40,000 DWT (A. 46). Before the effective date of Chapter 125, fifteen tankers in excess of 125,000 DWT called at Cherry Point (A. 46-47); no tanker of that size has called at Cherry Point since Chapter 125 went into effect (A. 44).

Now that the Trans-Alaska Pipeline has been completed, ARCO intends to transport oil from the terminus of that pipeline, at Valdez, Alaska, by tanker to Cherry Point (A. 45).<sup>2</sup> ARCO plans to use seven vessels of between 50,000 and 120,000 DWT, and two 150,000 DWT vessels that are under construction, for that purpose (A. 50).<sup>3</sup>

ARCO has always used state-licensed pilots on all tankers entering Puget Sound (A. 66). Its use of tug escorts prior to enactment of Chapter 125 was occasional (A. 67). Since that time ARCO has complied with the requirements of Chapter 125; in the district court the parties stipulated that the average cost per vessel to ARCO of complying with the tug escort re-

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<sup>2</sup> All of the Alaska oil will be delivered by tanker from Valdez to West Coast ports. Fifteen percent is slated for Puget Sound, 40 percent for San Francisco, and 45 percent for Long Beach (A. 49). The amount of oil involved is expected to be three times the volume of oil transported by tanker between domestic ports in 1974 (A. 49). At Valdez, four docking facilities are under construction, each of which will be capable of accommodating tankers of 250,000 DWT (A. 49). Approximately one-third of the tankers expected to participate in the Alaska trade will be in excess of 125,000 DWT (A. 50).

<sup>3</sup> ARCO has also contracted to build three other tankers, two of 151,000 DWT and the third of 120,000 DWT, to be used in the foreign trade (A. 54).

quirement has been approximately \$7,500 and that at that average cost ARCO's annual cost of compliance would be approximately \$277,500, or about one cent per barrel of oil delivered by tanker to Cherry Point (A. 68).<sup>4</sup>

2. Seatrain Lines, Inc., owns or charters 12 tanker vessels in domestic and foreign commerce (A. 41, 53). Four of those vessels are foreign flag and exceed 125,000 DWT: six are less than 40,000 DWT and therefore are not affected by Chapter 125 (A. 53). No Seatrain tanker has entered Puget Sound since the enactment of Chapter 125 (A. 44).

Through a wholly owned subsidiary corporation Seatrain operates a shipbuilding facility at the Brooklyn Navy Yard in New York City, where it has recently constructed or is constructing four 225,000 DWT tankers (A. 41, 54-55, 61). With respect to each of those tankers Seatrain has received federal subsidies under the Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1101 *et seq.* (A. 55, 61-62).

3. ARCO and Seatrain sought to enjoin enforcement of Chapter 125 on the grounds that it is preempted by several federal statutes (A. 22-29)—especially the Ports and Waterways Safety Act of 1972

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<sup>4</sup> A barrel of crude oil equals 42 U.S. gallons (A. 45 n. 3). Approximately 7.2 barrels (302 gallons) comprise one long ton (2,240 pounds), in which deadweight tonnage is measured (A. 43 n. 1). Thus, a tanker of 100,000 DWT could carry 720,000 barrels of oil and would incur a tug escort fee of \$7,500.

("PWSA")—and imposes an impermissible burden on interstate and foreign commerce (A. 29-30). The three-judge district court upheld ARCO's claims of preemption under the Supremacy Clause without reaching the issue under the Commerce Clause. The court ruled that Chapter 125 is completely preempted by the PWSA (J.S. App. C, pp. 5a-12a) and it enjoined the defendant officials from enforcing or attempting to enforce the state statute in any respect (J.S. App. B, pp. 3a-4a). On January 10, 1977, this Court granted appellants' application for a stay of the injunction pending final disposition of their appeal (A. 373).

#### INTRODUCTION AND SUMMARY

1. The Ports and Waterways Safety Act of 1972 ("PWSA") is designed to protect the navigable waters of the United States, and the land adjacent thereto, from damage resulting from maritime accidents. Title I of PWSA, codified at 33 U.S.C. (Supp. V) 1221 *et seq.*, is principally concerned with the prevention of vessel collisions and the avoidance and containment of shoreside accidents. The purpose of Title I is "to prevent damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters; and to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction, or

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<sup>5</sup> 86 Stat. 424, 427, codified at 33 U.S.C. (Supp. V) 1221 *et seq.* and 46 U.S.C. (Supp. V) 391a *et seq.*

loss \* \* \*.<sup>7</sup> 33 U.S.C. (Supp. V) 1221. Title II of PWSA, codified at 46 U.S.C. (Supp. V) 391a *et seq.*, is principally concerned with minimum design and construction requirements for oil tankers plying the navigable waters of the United States. Congress' "Statement of Policy" in Title II declares "[t]hat the carriage by vessels of certain cargoes in bulk creates substantial hazards to life, property, the navigable waters of the United States \* \* \* and the resources contained therein and of the adjoining land \* \* \*" necessitating the establishment, *inter alia*, of minimum standards of design and construction of such vessels. 46 U.S.C. (Supp. V) 391a.

Title I states that, in ports and other waters "subject to congested vessel traffic," the Secretary of the Department in which the Coast Guard is operating (now the Department of Transportation) may establish a vessel traffic system and require vessels to install "electronic or other devices" necessary to comply with that system (33 U.S.C. (Supp. V) (1221(1) and (2)). In areas or at times that the Secretary determines pose "especially hazardous" conditions, the Secretary may also "control" vessel traffic by various means: he may specify the timing and routing of vessel traffic; he may impose vessel size and speed limitations, as well as "vessel operating conditions"; and he may restrict vessel operation "to vessels which have particular operating characteristics and capabilities" necessary for safe operation under the cir-

cumstances (33 U.S.C. (Supp. V) 1221(3)). In addition, the Secretary may establish across-the-board requirements regarding the handling and stowage of explosives or other dangerous articles (33 U.S.C. (Supp. V) 1221(6)), and, when necessary to prevent damage to or by a particular vessel, he may direct that the vessel be anchored or moved (33 U.S.C. (Supp. V) 1221(4)).

Title I also confers upon the Secretary limited authority to require pilots on vessels engaged in the foreign trades. That authority may be exercised only "where a pilot is not otherwise required by State law to be on board" and only "until the State \* \* \* establishes a requirement for a pilot in [the] area or under the circumstances involved" (33 U.S.C. (Supp. V) 1221(5)).<sup>8</sup>

Title II amends the Tank Vessel Act,<sup>9</sup> which, as enacted in 1936, "provided the Coast Guard comprehensive authority to issue regulations with respect to certain vessels having on board inflammable or combustible liquid cargoes in order to secure effective provision 'against the hazards of life and property'" (S. Rep. No. 92-724, 92d Cong., 2d Sess. 21 (1972)

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<sup>8</sup> As to shoreside structures, Title I provides that the Secretary may prescribe "minimum safety equipment requirements" to assure adequate protection from fire, explosions, and other serious accidents (33 U.S.C. (Supp. V) 1221(7)). Nothing in Title I prevents a state "from prescribing for structures only higher safety equipment requirements" than those set by the Secretary (33 U.S.C. (Supp. V) 1222(b)).

<sup>7</sup> Rev. Stat. Section 4417, as amended, 46 U.S.C. 391a *et seq.*

(hereinafter "S. Rep."')).<sup>8</sup> Title II was added by the Senate to supplement the vessel traffic system scheme of Title I "by also requiring that vessels be built to higher standards of design and construction, and subject to higher standards in their operation" (S. Rep., *supra*, at pp. 7-8). Thus, while Title I "can be likened to providing safer surface highways and traffic controls for automobiles," Title II can be "likened to providing safer automobiles to transit those highways" (*id.* at 9-10).

To provide both for vessel safety and for protection of the marine environment, the Secretary is directed by Title II to establish "rules and regulations as may be necessary" with respect to the design, construction and maintenance of all oil tankers, American or foreign flag, entering our navigable waters (46 U.S.C. (Supp. V) 391a(3)). The power conferred is broad: the Secretary's regulations may prescribe standards for vessel superstructures, hulls, cargo compartments, fittings and appliances, propulsive machinery, boilers, and the materials used in any of the foregoing; for the manner of handling or stowing oil and the machinery used; for equipment for the protection of life and for the prevention and mitigation of damages

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<sup>8</sup> Although Congress believed that the Tank Vessel Act itself arguably was broad enough "to encompass promulgation of standards for the protection of the marine environment," it noted that "environmental protection has not been an identified objective of" that Act and accordingly passed Title II in order to provide "a specific mandate by the Congress for rules and regulations also directed to protection of the marine environment" (S. Rep., *supra*, at p. 21).

to the marine environment; and for the manning of oil tankers and the operation itself of such vessels. *Ibid.* The design and construction requirements are to "include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities" (46 U.S.C. (Supp. V) 391a(7)).

Both American and foreign vessels are required to comply with the regulations issued under both Title I and Title II (33 U.S.C. (Supp. V) 1221; 46 U.S.C. (Supp. V) 391a(5) and (6)), upon pain of civil and criminal penalties (33 U.S.C. (Supp. V) 1226 and 1227; 46 U.S.C. (Supp. V) 391a(11)).<sup>9</sup> In addition, the Secretary is authorized to "deny entry into the navigable waters of the United States to any vessel not in compliance" with his regulations under Title II (46 U.S.C. (Supp. V) 391a(13)).

2. In determining whether Chapter 125 is preempted by the PWSA, "[t]he first inquiry" is whether Congress "has prohibited state regulation of

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<sup>9</sup> Acting under Title I, the Secretary has established a vessel traffic system for Puget Sound. 33 C.F.R. Part 161, Subpart B. That system provides, *inter alia*, for separated traffic lanes and requires that vessels in the Sound communicate frequently with the Coast Guard's Vessel Traffic Center in Seattle. The regulations promulgated by the Secretary under Title II are discussed at pp. 21-22 note 21, *infra*.

the particular aspects of commerce involved." *Jones v. Rath Packing Co.*, No. 75-1053, decided March 29, 1977, slip op. 4. Since Chapter 125 represents an exercise by the State of Washington of its police power, the Court must "start with the assumption that the historic police powers of the State[] were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Slip op. 4, quoting from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230. That "clear and manifest purpose" may be found "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Slip op. 4.

Even absent a congressional determination in the PWSA to oust the states from the field of oil tanker regulation, any aspect of Washington's Tanker Law that conflicts with the PWSA must fall. Slip op. 4-5. The conflict need not be such as to make compliance with both statutes impossible. The state law is overridden if in any respect it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Slip op. 5, quoting from *Hines v. Davidowitz*, 312 U.S. 52, 67. In determining whether a fatal conflict exists, no less than in determining whether Congress has expressed an intent to occupy the field, the Court must give due regard to "the federal-state balance" (*United States v. Pass*, 404 U.S. 336, 349); whenever possible, "the proper ap-

proach is to reconcile 'the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127, quoting from *Silver v. New York Stock Exchange*, 373 U.S. 341, 357. See *De Canas v. Bica*, 424 U.S. 351, 357-358 n. 5.

Finally, even though the PWSA contemplates comprehensive federal regulation of both the physical characteristics and actual operation of oil tankers in American waters, it does not necessarily follow that there is no room left for complementary state legislation. While in a particular case "the pervasive nature of the scheme of federal regulation [may lead] the Court to conclude that there is pre-emption" (*City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633), "[t]he fact that the federal regulations [are] numerous and elaborate does not extend them beyond the boundary they established" (*Kelly v. Washington*, 302 U.S. 1, 13). The Court has often recognized that even a comprehensive federal regime does not automatically preclude state action in the same field. E.g., *De Canas v. Bica*, *supra*, 424 U.S. at 359; *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 330, 341-342. "Given the complexity of the matter addressed by Congress in [the PWSA], a detailed statutory scheme was both likely and appropriate, completely apart from any questions

of pre-emptive intent." *New York Department of Social Services v. Dubiino*, 413 U.S. 405, 415. Ultimately "each case turns on the peculiarities and special features of the federal regulatory scheme in question" (*City of Burbank v. Lockheed Air Terminal, Inc.*, *supra*, 411 U.S. at 638) and of the state statute said to be preempted.

3. Applying the foregoing principles to the present controversy, we conclude, first, that Chapter 125's requirement that vessels exceeding 50,000 DWT take on a state-licensed pilot is not preempted by the PWSA insofar as that requirement applies to registered vessels engaged in the foreign trade. On the contrary, Section 101(5) of the PWSA, 33 U.S.C. (Supp. V) 1221(5), authorizes the Secretary to require pilots on vessels "engaged in the foreign trades" only in the absence of state pilot requirements: it follows that state regulation in this area is expressly contemplated, rather than preempted, by the federal Act. Insofar as Chapter 125's pilotage requirement extends to American flag vessels engaged in the coasting trade, however, we agree with the district court's conclusion that it is preempted, wholly apart from the PWSA, by 46 U.S.C. 215 and 364.<sup>10</sup> Appellants so concede (Br. 10 n. 9).

Section 3(2) of Chapter 125 requires that all tankers between 40,000 and 125,000 DWT satisfy certain design and construction standards or, failing that, take on a tug escort when navigating Puget

Sound. In our view the PWSA would preempt any state effort to exclude altogether the entry of tankers that did not comply with the state's design and construction standards. The PWSA gives the Secretary of Transportation virtually plenary authority to establish such standards for all oil tankers traversing American waters, and to be effective the Secretary's regulations must command uniform adherence. A spate of inconsistent state standards would have the practical effect of nullifying the Secretary's regulations and would impair the effective exercise of his responsibility under 46 U.S.C. (Supp. V) 391a(7) to attempt to coordinate his standards with those recognized by the international maritime community. In addition, state regulation of tanker design would jeopardize the success of the construction-differential subsidy program of the Merchant Marine Act of 1936 by interfering with the access to major ports of tankers built with the aid of public funds under that program.

On the other hand, an across-the-board tug escort requirement would not be preempted. In contrast to design and construction standards, tug escort requirements can be satisfied with relatively little inconvenience and expense and are similar to pilotage requirements, which have long been acknowledged as an appropriate subject matter for state and local regulation. See *Cooley v. Board of Wardens*, 12 How. 298. Neither the legislative history nor the text of the PWSA reveals a "clear and manifest purpose" (*Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230)

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<sup>10</sup> These statutes authorize the Coast Guard to regulate pilotage on enrolled vessels and prohibit the states from doing so. See p. 16, *infra*.

to override such regulatory efforts on the part of the states, and, in the absence of superseding federal regulations on the subject, across-the-board state tug escort requirements would not interfere with the administration or objectives either of the PWSA or of the Merchant Marine Act.

Section 3(2) imposes neither a complete ban on tankers between 40,000 and 125,000 DWT that do not conform to its design and construction standards, nor an across-the-board tug escort requirement. Rather, it imposes the tug requirement in effect as a penalty for noncompliance with the State's design standards. No vessel in existence can satisfy those standards, however, and the cost of taking on a tug escort is so small in comparison to the cost of complying with the design standards that, as a practical matter, it can be anticipated that ship builders and operators will simply ignore those standards. In these circumstances, we believe that Section 3(2) does not so encourage disregard for federal design and construction standards in favor of state standards as to be preempted by the PWSA or the Merchant Marine Act.<sup>11</sup>

Chapter 125's ban on tankers of 125,000 DWT or more is preempted with regard to federally licensed vessels by the Enrollment and Licensing Act. See *Douglas v. Seacoast Products, Inc., supra; Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132;

<sup>11</sup> In the district court the United States argued, as *amicus curiae*, that Chapter 125 was invalid in all respects, but further study has persuaded us that the tug escort provision of Chapter 125 is not preempted.

*Gibbons v. Ogden*, 9 Wheat 1. It is also preempted, with regard to both enrolled and registered vessels, by both Titles I and II of the PWSA. Title I empowers the Secretary to control vessel traffic in hazardous areas or conditions by establishing vessel size limitations (33 U.S.C. (Supp. V) 1221 (3)(iii)), and Title II empowers him to "deny entry into the navigable waters of the United States to any vessel not in compliance with" federal design and construction standards (46 U.S.C. (Supp. V) 391a(13)). The tanker ban interferes with the full exercise of these powers, and thereby undermines the Secretary's ability under the PWSA effectively to establish the physical standards for vessels navigating American waters. Moreover, the ban on tankers in excess of 125,000 DWT imperils the success of the construction-differential subsidy program of the Merchant Marine Act, under which approximately \$500 million in public funds has been paid or is slated for payment for the construction of tankers of that size.

#### ARGUMENT

##### I

###### CHAPTER 125'S PILOTAGE REQUIREMENT IS PREEMPTED BY FEDERAL LAW WITH RESPECT TO ENROLLED VESSELS BUT NOT WITH RESPECT TO REGISTERED VESSELS

Section 2 of Chapter 125 states that "any oil tanker, whether enrolled or registered, of fifty thousand deadweight tons or greater, shall be required to take

a Washington State licensed pilot while navigating Puget Sound \* \* \* (A. 98). The district court correctly held (J.S. App. C, p. 9a) that insofar as this requirement extends to enrolled vessels<sup>12</sup> it conflicts with 46 U.S.C. 215 and 364 and therefore is invalid. The Coast Guard has authority under 46 U.S.C. 364 to license and regulate pilots on enrolled vessels,<sup>13</sup> and 46 U.S.C. 215 expressly prohibits the states from imposing additional licensing requirements with respect to the pilots of such vessels.<sup>14</sup> These federal statutes preempt any effort by the states to impose pilotage requirements on enrolled vessels. *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 200-201; *Sprague v. Thompson*, 118 U.S. 90, 95-96. Appellants therefore

<sup>12</sup> Enrolled vessels are those federally licensed to engage in the coastwise trade. Registered vessels are those engaged in the foreign trade. "The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license. The distinction between these two classes of vessels is kept up throughout the legislation of Congress on the subject, and the word register is invariably used in reference to the one class, and enrolment, in reference to the other." *The Mohawk*, 3 Wall. 566, 571. See *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199. See also *Douglas v. Seacoast Products, Inc.*, No. 75-1255, decided May 23, 1977, slip op. 7-8.

<sup>13</sup> "[E]very coastwise seagoing steam vessel \* \* \* not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the Coast Guard." 46 U.S.C. 364.

<sup>14</sup> "No State or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States \* \* \*." 46 U.S.C. 215.

appropriately concede (Br. 10 n. 9) that Section 2 of Chapter 125 is invalid insofar as it attempts to reach enrolled vessels.

Section 2 is not preempted, however, insofar as it applies to registered vessels. Congress explicitly exempted vessels "sailing under register" from the requirement that they be "under the control and direction of pilots licensed by the Coast Guard." 46 U.S.C. 364.<sup>15</sup> See *Anderson v. Pacific Coast S.S. Co.*, *supra*, 225 U.S. at 200-201.

Nor is Section 2 preempted by the PWSA. On the contrary, Section 101(5) of that Act, 33 U.S.C. (Supp. V) 1221(5), authorizes the Secretary to "require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved." This language evidences Congress' intent to leave undisturbed the states' long-standing authority to impose pilotage requirements in the absence of superseding or conflicting federal regulation. See *Cooley v. Board of Wardens*, 12 How. 298; *Anderson v. Pacific Coast S.S. Co.*, *supra*. It follows that the State of Washington may legitimately require registered oil tankers to take on state licensed pilots in Puget Sound and that Section 2 of Chapter 125 is enforceable in this respect.

<sup>15</sup> Appellees acknowledge that Section 2 is not preempted by 46 U.S.C. 215 and 364 (Complaint, ¶ 26, A. 27; Plaintiff's Trial Brief, p. 62).

## II

CHAPTER 125'S TUG ESCORT REQUIREMENT IS NOT  
PREEMPTED BY FEDERAL LAW

Section 3(2) of Chapter 125 provides, in the first instance, that oil tankers of between 40,000 and 125,000 DWT may not enter Puget Sound unless they satisfy certain design and construction requirements.<sup>16</sup> A proviso to that section, however, excuses noncompliance for vessels that take on an "escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the [vessel's] deadweight tons." Taken as a whole, therefore, Section 3(2) requires oil tankers of between 40,000 and 125,000 DWT that do not satisfy state-imposed design and construction requirements to be accompanied by a tug escort when navigating Puget Sound. We believe that this requirement is not currently preempted by federal law.

As we show below (pp. 19-31, *infra*), a state may not bar entry of tankers that do not comply with its design and construction standards. On the other hand, until federal regulations are promulgated to the contrary, a state may impose reasonable tug escort requirements on all vessels entering its navigable waters (pp. 31-34, *infra*). In these circumstances, and especially because the cost of complying with Washington's tug escort requirement is small relative to that of satisfying its design and construction specifications,

<sup>16</sup> The vessels must be equipped with a prescribed shaft horsepower, twin screws, double bottoms, two radars, one of which must be collision avoidance radar, and "[s]uch other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners."

we conclude that for the present the State may impose that requirement in effect as a penalty for noncompliance with its design and construction standards (pp. 34-37, *infra*).

A. A STATE MAY NOT BAR ENTRY OF TANKERS THAT DO NOT COMPLY WITH ITS DESIGN AND CONSTRUCTION STANDARDS

Title II of the PWSA gives the Secretary comprehensive authority to establish the physical and operating standards that vessels navigating American waters must meet:<sup>17</sup>

\* \* \* the Secretary \* \* \* shall establish \* \* \* such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo [oil], fittings,

<sup>17</sup> Arguably the Secretary would also have power under Title I to promulgate design and construction standards. See 33 U.S.C. (Supp. V) 1221(3)(iii) and (iv), authorizing the Secretary, in areas or under circumstances posing especially hazardous conditions, to establish "vessel size and speed limitations" and to restrict vessel operation "to vessels which have particular operating characteristics and capabilities." Title II, however, explicitly directs the Secretary to establish design and construction standards and does not limit his authority to act only in hazardous areas or circumstances. Its addition to Title I suggests that Congress doubted that the powers conferred by the latter were sufficiently broad to assure "the adequate protection of the marine environment" (46 U.S.C. (Supp. V) 391a(1)) through improvement of vessel design and construction. See S. Rep., *supra*, at p. 14 (the goals of Title II "could probably not be adequately approached through" Title I). In exercising his authority to establish design and construction standards, the Secretary has acted principally under Title II rather than Title I (see 40 Fed. Reg. 48280, 48283 (1975); 42 Fed. Reg. 24868, 24869 (1977)).

equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; with respect to the handling and stowage of such cargo, the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life saving, fire protection, and the prevention and mitigation of damage to the marine environment; and with respect to the operation of such vessels \* \* \*. [46 U.S.C. (Supp. V) 391a(3).]<sup>18</sup>

Neither Title II itself nor its legislative history contains an express declaration of preemption. "That, however, is not decisive." *City of Burbank v. Lockheed Air Terminal, Inc.*, *supra*, 411 U.S. at 633. In our view, the breadth of the responsibilities conferred upon the Secretary, the assignment to him of the duty to balance the need for design and construction standards, and the very nature of the subject matter to be regulated, all lead to the conclusion that state statutes that would ban vessels for noncompliance with state-imposed design and construction standards are preempted.

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<sup>18</sup> "To the extent possible" the standards promulgated under the foregoing authority are to "include, but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities." 46 U.S.C. (Supp. V) 391a(7).

*1. Tanker design and construction standards must be uniform*

To be effective, the Secretary's regulations under Title II must command uniform adherence throughout the country.<sup>19</sup> If each coastal state, acting on the basis of local interests, were permitted to impose its own design and construction standards, the conflicting obligations faced by shipbuilders and operators would be intolerable.<sup>20</sup> Moreover, the Secretary's regulations in practical effect would be nullified in any state where more stringent requirements were enacted.<sup>21</sup> In short, state imposition of mandatory design and construction standards would frustrate Congress' purpose "to establish comprehensive regulations for the design, construction, maintenance, and operation of [oil tankers]." S. Rep., *supra*, at p. 7; see also *id.* at 9-10.

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<sup>19</sup> The inquiry into the need for uniformity typically characterizes cases decided under the Interstate Commerce Clause. *E.g.*, *Kelly v. Washington*, *supra*, 302 U.S. at 14-15; *Cooley v. Board of Wardens*, *supra*, 12 How. at 317-320. But it is no less appropriate in preemption cases, such as this one, where the federal statute requires a unitary regulatory scheme lest Congress' will be frustrated. See, *e.g.*, *City of Burbank v. Lockheed Air Terminal, Inc.*, *supra*, 411 U.S. at 638-639.

<sup>20</sup> The promulgation by the coastal states of different design and construction standards is more than just a possibility. The State of Alaska has recently enacted legislation requiring payment of a "risk charge" by vessels that do not conform to design requirements that are materially different from Chapter 125's (Alaska Statutes § 30.20.010 (Cum. Supp. 1976) (see A. 95-96)), and the State of California is considering the adoption of similar legislation (Br. for the State of California, *et al.*, p. 3 n. 2).

<sup>21</sup> Chapter 125's design and construction standards are considerably more stringent than those that the Secretary, through a

The objective of the original Tank Vessel Act, to which Title II is an amendment, was the establishment of "a reasonable and *uniform* set of rules and

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delegation of his authority under Title II to the Coast Guard (49 C.F.R. 1.46(n)(4)), has promulgated. See 33 C.F.R. Part 157 (Rules and Regulations for Protection of the Marine Environment Relating to Tank Vessels Carrying Oil in Domestic Trade). Effective October 14, 1975, new tankers of 70,000 DWT or more that engage in the domestic trade were required to have segregated ballast tanks and to conform to tank arrangement and size requirements and structural and stability requirements; existing vessels in the domestic trade were required to be upgraded by the use of slop tanks, separators, oil discharge and monitoring systems, and the alteration of piping systems. Those regulations were designed to conform to the standards specified in the International Convention for the Prevention of Pollution from Ships, 1973. See 40 Fed. Reg. 48280 (1975). The Convention did not adopt the requirements imposed by Chapter 125, and the Secretary's regulations do not include such requirements. See *ibid.*; see also the Coast Guard Final Environmental Statement accompanying that rulemaking (A. 207, 209, 305, 310).

Effective January 8, 1976, additional requirements for the distribution of segregated ballast were imposed upon the new vessels subject to the foregoing regulations. 41 Fed. Reg. 1479 (1976). These requirements go beyond those imposed by the 1973 Convention. See 41 Fed. Reg. 54177 (1976). On December 13, 1976, the regulations were extended to cover foreign-flag as well as United States-flag vessels. *Ibid.* The Coast Guard on May 16, 1977, announced a proposed rulemaking (42 Fed. Reg. 24868) that, in accordance with the President's Message to Congress of March 17, 1977, would substantially revise Part 157 by imposing more stringent design and construction requirements than those now in effect. See note 27, *infra*.

Acting under Title I, the Coast Guard has promulgated Navigation Safety Rules, 33 C.F.R. Part 164 (adopted at 42 Fed. Reg. 5956 (1977)), which require, *inter alia*, that vessels over 1600 DWT carry certain safety equipment (*e.g.*, a radar system and an echo depth sounding device). Those rules are also subject to a proposed amendatory rulemaking. 42 Fed. Reg. 24871 (1977).

regulations concerning ship construction \*\*\*." H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936) (emphasis added). Congress' direction to the Secretary in Title II to establish "minimum standards" of design and construction (46 U.S.C. (Supp. V) 391a(7)) does not evidence an intention to alter the design of the original Act by allowing the states to impose more demanding standards. Rather, the phrase "minimum standards" implies only that the Secretary may not bar shipbuilders and operators from voluntarily adopting higher standards *on their own*.<sup>22</sup>

Congress directed the Secretary, in setting uniform minimum design and construction standards, to weigh "the extent to which such [standards] will contribute

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<sup>22</sup> In *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, the Court held that the Agricultural Adjustment Act, 48 Stat. 31, 7 U.S.C. 601 *et seq.*, which authorizes the Secretary of Agriculture to establish "minimum standards of quality and maturity" for agricultural commodities (7 U.S.C. 602(3)), did not preempt the State of California's regulations regarding the maturity of avocados reaching its retail markets even though those regulations set forth a different test for maturity than a federal marketing order promulgated under the Act. The Court said (373 U.S. at 148), "[b]y its very terms, in fact, the [federal] statute purports only to establish *minimum standards*" (emphasis in original). The Court did not, however, rest its decisions solely on Congress' use of the term "minimum standards." On the contrary, it ruled (*ibid.*) that the "[o]ther provisions of the Act, and their history, militate even more strongly against federal displacement of these state regulations." See *id.* at 148-150. The decision therefore does not stand for the proposition that whenever Congress provides for "minimum standards" in a federal regime state regulation in the same field is necessarily permissible. Each preemption case "turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed Air Terminal, Inc.*, *supra*, 411 U.S. at 638.

to safety or protection of the marine environment" against "the practicability of compliance therewith, including cost and technical feasibility." 46 U.S.C. (Supp. V) 391a(4).<sup>23</sup> That responsibility cannot reasonably be shared with the states. The establishment of design and construction standards "requires a delicate balance between safety and efficiency," and "[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the [PWSA] are to be fulfilled." *City of Burbank v. Lockheed Air Terminal, Inc.*, *supra*, 411 U.S. at 638-639.

Although Title II, which is the principal source of the Secretary's power to impose tanker design and construction standards, contains no express statement of preemption, Section 102(b) of Title I provides that the states may prescribe safety equipment standards "for structures only." 33 U.S.C. (Supp. V) 1222(b). That provision preempts state efforts to regulate vessel equipment (see pp. 33-34, *infra*), and it supports the conclusion that the more expansive power to regulate vessel design and construction also was meant to be exercised by the Secretary alone.

*2. The power to impose design standards on foreign vessels rests solely with the Secretary under the PWSA*

Congress considered the possibility of restricting Title II to American vessels alone. S. Rep., *supra*, at

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<sup>23</sup> Furthermore, "the Secretary is free to exercise his discretion in determining in each instance whether a particular requirement should apply only to new construction, to existing vessels, to vessels in the process of being constructed, and so forth." S. Rep., *supra*, at p. 27.

p. 22. Ultimately it determined to extend Title II to foreign vessels as well,<sup>24</sup> but in so doing it acknowledged that there were "justifiable concerns \* \* \* about the unilateral application by the United States of standards on vessels of foreign registry," for "this has traditionally been an area for international rather than national action." *Id.* at 22-23. Congress was aware of the existence of multinational organizations dedicated to improving vessel standards and recognized that "since the problem of marine pollution is world-wide," multilateral action "would be far preferable to unilateral imposition of standards." *Id.* at 23.

Congress' decision to extend Title II to foreign as well as American vessels rested in large part on its conclusion that the need for vessel design standards to protect the environment was too pressing to await

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<sup>24</sup> "[C]omprehensive new standards applicable only to United States-flag vessels would be ineffective and possibly self-defeating. Representatives of the Department of Transportation and the Department of Commerce indicated that approximately 85 percent of the tankers operating in our navigable waters are of foreign registry. Clearly, legislation which did not apply to the overwhelming majority of the vessels in our waters would have little beneficial impact on the environment. In addition, the imposition of standards involving some cost on American vessels without corresponding imposition of the same standards on foreign vessels, would put American vessels at a competitive disadvantage and perhaps ultimately result in U.S. flag vessels representing an even smaller part of the total number of tankers in our waters. Therefore, new standards must apply equally to both U.S. and foreign vessels if the environment is to be protected and if the American merchant marine is not to be competitively disadvantaged." S. Rep., *supra*, at p. 22.

the uncertain outcome of international negotiation.<sup>25</sup> But its determination to proceed unilaterally was not made without regard to the possibility that effective multinational standards might soon be forthcoming. See S. Rep., *supra*, at p. 28. “[I]n light of the preference for multilateral action \* \* \* the use of a deferral procedure” (*id.* at 23–24, 27) was adopted. With respect solely to standards relating to design, construction, alteration, and repair,<sup>26</sup> the Secretary is required to transmit his proposed regulations “to appropriate international forums for consideration as international standards.” 46 U.S.C. (Supp. V) 391a(7)(B). The Secretary was forbidden to take final, unilateral action before January 1, 1974. 46 U.S.C. (Supp. V) 391a(7)(C). “The purpose of this deferral of the effective date [was] to apprise other nations of the intent of the United States to impose standards on vessels in its navigable waters and to permit a reasonable period for international action.” S. Rep., *supra*, at p. 28. Congress further expressed its view that, if an international “marine environmental safety convention is concluded, and rules and regulations are

<sup>25</sup> “As a practical matter, the IMCO [Intergovernmental Maritime Consultative Organization] record has been rather dismal to date in the area of design and construction standards for protection of the marine environment. \* \* \* While the committee remains committed to the proposition that multilateral action in this area is preferable, it is not willing to sacrifice the objective of protection of the marine environment on the altar of that principle. Much more rapid and comprehensive action will be required if the United States is to continue to rely on multilateral forums.” S. Rep., *supra*, at p. 23.

<sup>26</sup> “Other areas for regulation (for example, loading and unloading procedures, equipment, and so forth) are not affected \* \* \*. S. Rep., *supra*, at p. 28.

adopted pursuant to such convention which generally address the regulation of similar topics as those published by the Secretary \* \* \* there will be no need for unilateral imposition of standards by the United States.” *Ibid.*<sup>27</sup>

Approximately eighty-five percent of the tankers operating in our navigable waters are of foreign registry (S. Rep., *supra*, at p. 22), and ninety-four percent of the oil imported by the United States is

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<sup>27</sup> The January 1, 1974, date was chosen by Congress in consideration of the then-impending 1973 International Conference on Marine Pollution. S. Rep., *supra*, at p. 28. That Conference resulted in the International Convention for the Prevention of Pollution from Ships, 1973, and the Secretary’s first regulations under Title II conformed to the standards specified in that Convention. See note 21, *supra*.

On March 17, 1977, the President transmitted a message to Congress in which he announced a series of initiatives designed to cope with the problem of pollution from oil tankers. See 13 Weekly Comp. of Pres. Doc. 408 (March 21, 1977). He stated that “[p]ollution of the oceans by oil is a global problem requiring global solutions” and announced his intention “to communicate directly with the leaders of a number of major maritime nations to solicit their support for international action.” He asked the Senate to ratify the International Convention for the Prevention of Pollution from Ships, and he instructed the Secretary of Transportation to establish new design and equipment standards for all oil tankers over 20,000 DWT calling at American ports. Those standards, to be effective within five years, include requirements for double bottom hulls on all new tankers and inert gas and backup radar systems on all tankers. The President also instructed the Department of State and the Coast Guard “to begin diplomatic efforts to improve the present international system of inspection and certification” of vessels, and recommended “the immediate scheduling of a special international conference for late 1977 to consider these construction and inspection measures.”

The Secretary has noticed a proposed rulemaking to amend Part 157 to implement the standards called for by the President (42 Fed. Reg. 24868 (1977)), and those standards have been

carried in foreign-flag ships (A. 58). Given Congress' recognition that, in extending Title II to foreign vessels, it was entering into "a delicate area of international relationships" (S. Rep., *supra*, at p. 24), its "strong intention that standards for the protection of the marine environment be adopted, multilaterally if possible" (*id.* at 28), and its expression of that intent in the statute, it is most unlikely that Congress also could have contemplated that each of the coastal states would remain free, after passage of the PWSA, to impose upon foreign vessels design and construction standards different from each other's and from the Secretary's. Congress was concerned about the international consequences of even a single standard imposed unilaterally by the United States; it cannot be understood to have countenanced the promulgation of a patchwork of conflicting standards that would be the likely result of independent action by the several coastal states.<sup>28</sup>

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transmitted to IMCO for its consideration. The Secretary advises us that those standards are expected to be voted on by IMCO at a meeting scheduled for February 1978.

<sup>28</sup> We disagree with appellants' contention that consideration of other federal statutes relating to conservation of the marine environment and the waters of the United States leads to the conclusion that the PWSA is not preemptive. The four statutes cited by appellants—the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. (Supp. V) 1251 *et seq.*; the Coastal Zone Management Act of 1972, 86 Stat. 1280, 16 U.S.C. (Supp. V) 1451 *et seq.*; the Estuarine Areas Act of 1968, 82 Stat. 625, 16 U.S.C. 1221 *et seq.*; and the Deepwater Port Act

*3. The Merchant Marine Act of 1936 further evidences a federal intent to preempt the field of tanker design*

The Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1101 *et seq.*, was enacted to foster and develop a merchant marine that is "owned and operated under the United States flag by citizens of the United States" and that is "composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States \* \* \*." 46 U.S.C. 1101.

Subchapter V of the Act, 46 U.S.C. 1151–1161, establishes the Construction-Differential Subsidy ("CDS") program, pursuant to which the Maritime Administration in the Department of Commerce, in order to promote shipbuilding in American shipyards, is authorized to subsidize the amount charged a ship purchaser by an American shipbuilder "over the

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of 1974, 88 Stat. 2126, 33 U.S.C. (Supp. V) 1501 *et seq.*—do indeed elicit and rely upon cooperation from the states. See, respectively, 33 U.S.C. (Supp. V) 1251(b); 16 U.S.C. (Supp. V) 1451 and 1452; 16 U.S.C. 1221; 33 U.S.C. (Supp. V) 1501. The district court correctly observed (J.S. App. C, pp. 9a-10a), however, that in each of the foregoing statutes "Congress explicitly invited state participation in various phases of the formation of the regulatory scheme," whereas in the PWSA it did not. Moreover, none of the Acts relied on by appellants—in contrast to the PWSA—requires uniformity of regulation for both domestic and foreign policy reasons. In short, Congress' creation of cooperative federal-state programs to deal with some aspects of marine conservation does not indicate that it intended that the Secretary's power to regulate tanker design standards under the PWSA in effect would be subject to veto by the states.

fair and reasonable estimate of cost \* \* \* of the construction of [the vessel] \* \* \* under similar plans and specifications \* \* \* in a [representative] foreign shipbuilding center \* \* \*.<sup>29</sup> 46 U.S.C. 1152(b). The program applies, with minor exceptions not relevant here, only to vessels "to be used in the foreign commerce of the United States."<sup>30</sup> 46 U.S.C. 1151.

During the period June 30, 1975, to September 30, 1976, ten new tankers built with the aid of approximately \$162.4 million in public funds under the program were delivered from United States shipyards.<sup>31</sup> As of September 30, 1976, there were outstanding contracts for the construction of 16 additional tankers, to be financed by an estimated \$385.2 million in CDS funds.<sup>32</sup> None of the ships that have been or are to be constructed under the program—representing a recent public investment of over \$547.6 million<sup>33</sup>—will comply with all of the design and construction standards of Section 3(2).

Before a subsidy application may be approved, the Secretary of Commerce must determine, *inter alia*, that "the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion

<sup>29</sup> Annual Report of the Maritime Administration for Fiscal Year 1976 and the Transition Quarter Ending September 30, 1976, Table 2, p. 74 (hereinafter "MarAd Annual Report"). The figure 162.4 million, which does not appear in Table II, has been supplied to us by the Maritime Administration.

<sup>30</sup> MarAd Annual Report, Appendix I, p. 80.

<sup>31</sup> Since the 1936 Act was passed, \$2,497,418,461 has been expended for new construction or reconstruction of all types of vessels. MarAd Annual Report, Appendix II, p. 82. Of that amount, the Maritime Administration advises us that \$422.6 million has been expended on tankers alone.

and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency."<sup>34</sup> 46 U.S.C. 1151(a).<sup>35</sup> The use of public funds in furtherance of the policies of the Merchant Marine Act could be largely defeated if the states were free to deny access of CDS vessels to major ports by enacting design requirements beyond those deemed necessary by the Secretary of Commerce.

**B. UNTIL FEDERAL REGULATIONS ARE PROMULGATED TO THE CONTRARY,  
A STATE MAY IMPOSE REASONABLE TUG ESCORT REQUIREMENTS ON  
ALL VESSELS ENTERING ITS NAVIGABLE WATERS**

In our view, the states at present have authority to impose reasonable tug escort requirements on all vessels entering their navigable waters. Acting under both Titles I and II of the PWSA,<sup>36</sup> the Secretary of

<sup>34</sup> The Maritime Administration advises us that subsidy will not be awarded for the construction of any tank vessel that could not meet the requirements for certification by the Coast Guard under 46 U.S.C., ch. 14, which includes the Tank Vessel Act as amended by Title II of the PWSA. In turn, the Secretary of Transportation under Title II of the PWSA is expressly directed, in formulating tanker design and construction standards, to "consult with other appropriate Federal departments and agencies, and particularly with \* \* \* the Secretary of Commerce." 46 U.S.C. (Supp. V) 391a(4). That provision was included in order to insure that the Maritime Administration "will be consulted and given an opportunity for input" into the rulemaking process. S. Rep., *supra*, at p. 26.

<sup>35</sup> Section 101(3)(iii) (in Title I) empowers the Secretary to control vessel traffic in hazardous areas or circumstances by establishing vessel operating conditions, and Section 201(3) (in Title II) directs him to establish such regulations as may be necessary with respect, *inter alia*, to the operation of oil tankers. Both of these grants of authority include the power to prescribe tug escort regulations.

Transportation has issued an advance notice of proposed rulemaking to amend 33 C.F.R. Part 164 to require tug escorts of vessels operating in confined waters. 41 Fed. Reg. 18770 (1976). The proposed federal rules "are intended to provide uniform guidance for the maritime industry and Captains of the Port[s]." *Id.* at 18771. When those rules become effective, they will supersede any inconsistent state regulations on the same subject. Pending their issuance in final form, however, we believe that reasonable, nondiscriminatory, state tug escort requirements are not preempted.<sup>24</sup>

The power to prescribe tug escort requirements is one traditionally within the competence of the states. Cf. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 343; *Huron Cement Co. v. Detroit*, 362 U.S. 440, 442. In the absence of any federal regulations on the subject, state action in this field is not prohibited, expressly or impliedly, by the PWSA, nor does it conflict with that Act in any respect. In contrast to design and construction standards, tug escort requirements entail relatively minor expense and do not significantly impede tanker traffic between the

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<sup>24</sup> The Secretary has proposed tug escort regulations in connection with the vessel traffic system established under Title I with respect to the Prince William Sound, which includes the port of Valdez, Alaska. See 42 Fed. Reg. 7164 (1977), amending 33 C.F.R. Part 161. Those regulations, which, when final, will preempt any conflicting requirements the State of Alaska might impose, provide that "[t]he master of a tank vessel of 35,000 or more gross tons operating in the VTS [Vessel Traffic System] area shall ensure that tug assistance is used when docking and undocking and, if directed by the VTC [Vessel Traffic Center], when in Valdez Narrows." 33 C.F.R. 161.376(b).

various coastal states. Foreign-flag vessels are accustomed to complying with local pilot rules, and the imposition of nondiscriminatory tug escort requirements as well is not likely to be a matter of international concern. In addition, such requirements have no adverse impact on the construction subsidy program under the Merchant Marine Act.

The prohibition in Section 102(b) of the PWSA, 33 U.S.C. (Supp. V) 1222(b), against state efforts to prescribe "higher safety equipment requirements or safety standards" for vessels than those promulgated by the Secretary does not, in our view, reach state tug escort requirements. As the legislative history of that provision demonstrates, it was meant to preempt state regulation of vessel equipment<sup>25</sup> and does

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<sup>25</sup> The preemptive language of Section 102(b) did not appear in the initial version of the bill (H.R. 8140) that became the PWSA. It was added by the House Committee on Merchant Marine and Fisheries (H.R. Rep. No. 92-563, 92d Cong., 1st Sess. 15 (1971)).

"\* \* \* [I]t was felt that H.R. 8140 does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. The inserted language is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated.

"Last year in the hearings on H.R. 17830 [a predecessor bill], Subcommittee Counsel asked the Coast Guard General Counsel whether it was the intention of the Coast Guard that States should prescribe safety equipment standards for vessels. The Coast Guard witness said that it was their intention that higher vessel equipment regulations and standards by States should apply to structures only and not to vessels. He agreed that the language of H.R. 17830 was not clear in this regard and that we should put some clarifying language in the section.

"Your Committee adopted the suggested language since it will make clear the intent mentioned above."

not reveal a "clear and manifest purpose" to supersede "the historic police powers of the State[]" (*Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at 230) when the exercise of those powers does not interfere with the administration or objectives of the federal Act.

**C. FOR THE PRESENT, A STATE MAY BURDEN NONCOMPLIANCE WITH ITS DESIGN AND CONSTRUCTION STANDARDS BY IMPOSING A SELECTIVE TUG ESCORT REQUIREMENT**

In the preceding sections we have shown, as limiting propositions, that a state may not impose mandatory design and construction standards on vessels entering its waters but may impose an across-the-board tug escort requirement on all vessels or, by inference, on all vessels of a certain size. Washington's Chapter 125 does neither of these things, however. Instead, the State has imposed a selective tug escort requirement that applies only to those vessels that do not comply with State design and construction standards.<sup>26</sup>

Section 3(2) of Chapter 125 in effect penalizes the

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<sup>26</sup> No tanker in existence satisfies the design standards of the Washington statute (A. 66). Thus the statute in fact currently operates as an across-the-board tug escort requirement for all oil tankers between 40,000 and 125,000 DWT. We believe, however, that the statute must be analyzed on its own terms, as a burden on noncompliance with state design and construction standards, and not as a *de facto* tug escort requirement of general applicability. There are two reasons for this, one legal and one practical: first, insofar as the statute is intended to induce or coerce compliance with the State's standards, the question whether such efforts to affect future behavior are preempted cannot be answered simply by stating that no vessels now comply with those standards;

operators of vessels that do not comply with design and construction standards different from those established by the federal government. There can be no doubt that, in so doing, Section 3(2) works somewhat at cross-purposes with the PWSA, which evinces a congressional intent to establish comprehensive and uniform regulations governing the design, construction, maintenance, and operation of oil tankers (see pp. 19-31, *supra*). We conclude, however, that Section 3(2) does not "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'". *Jones v. Rath Packing Co., supra*, slip op. 5, quoting from *Hines v. Davidowitz, supra*, 312 U.S. at 67.

As we have explained above (pp. 31-32, *supra*), state rules requiring tug escorts of vessels in their waters are subject to preemption by regulations that may be promulgated in the future by the Secretary of Transportation pursuant to Titles I and II of the PWSA. Final, comprehensive, federal regulations prescribing the circumstances or locales in which vessels must be accompanied by tug escorts, and those in which they need not be so accompanied, will supersede any state regulation of that subject, including the requirement imposed by Section 3(2). In these circumstances, a finding of current preemption would appear to be justified only if the state statute works a sub-

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second, to sustain the state statute for the present as an across-the-board tug escort requirement would merely defer final determination of the validity of the statute until the moment some vessel appears that complies with the state design and construction standards.

stantial and immediate interference with the federal scheme.

It cannot be said that Section 3(2) substantially interferes with the federal scheme. The cost of complying with Section 3(2)'s tug escort requirement is small relative to that of satisfying its alternative design and construction standards. No tanker now afloat has all of the design features prescribed by Section 3(2) (A. 66), and "retrofitting" existing tanker fleets to incorporate those features "is not economically feasible under current and anticipated market conditions" (A. 67). Thus it can be anticipated that, for the present, tanker operators plying Puget Sound will simply take on the required tug escort without making any effort at compliance with the State's design specifications.

The economic considerations are similar with respect to new construction. Just to equip a new tanker with double bottom and twin screws, not to mention the other equipment specified by Section 3(2) (see note 16, *supra*), increases its cost by approximately eleven percent (A. 62), or on the average by about \$10 million (see A. 54, 55). The burden of complying with the alternative tug escort requirement by comparison is insubstantial.<sup>37</sup>

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<sup>37</sup> ARCO estimates that, even operating several tankers, it will incur approximately \$277,500 in tug fees per year (A. 68). The discounted cost of making annual payments in that amount for fifty years, at an 8 percent discount rate, would be approximately \$3.4 million, or roughly one-third the cost of incorporating the design specifications of Section 3(2) into only a single new tanker. See, e.g., Bierman & Smidt, *The Capital Budgeting Decision* 396 (2d ed., 1966).

In short, Section 3(2) offers insufficient inducement, or applies inadequate coercion, to cause either shipbuilders or tanker operators to deviate from federal design and construction standards. This apparently would be true even if the alternative tug escort requirement were perceived to be permanent (see note 37, *supra*). But that requirement is not permanent; it is subject to imminent preemption by federal regulation. It seems plain that no builder, owner, or operator will undertake the major expense of complying with the State's design specifications merely in order to avoid what can be expected to be a temporary tug escort requirement. Accordingly, Section 3(2) does not so encourage disregard for federal design and construction standards in favor of state standards as to be preempted by the PWSA or the Merchant Marine Act.

### III

#### CHAPTER 125'S EXCLUSION OF TANKERS IN EXCESS OF 125,000 DWT IS PREEMPTED BY FEDERAL LAW

Section 3(1) of Chapter 125 provides that "[a]ny oil tanker, whether enrolled or registered, of greater than one hundred and twenty-five thousand dead-weight tons shall be prohibited from" entering Puget Sound. That provision is preempted, with respect to enrolled and licensed vessels, by the Enrollment and Licensing Act of February 18, 1793, 1 Stat. 305, 46 U.S.C. 251 *et seq.*, and, with respect to both enrolled and registered vessels, by the PWSA and the Merchant Marine Act of 1936.

**A. THE ENROLLMENT AND LICENSING ACT BARS THE STATES FROM UNREASONABLY BANNING LICENSED VESSELS FROM THEIR WATERS**

This Court determined in *Gibbons v. Ogden*, 9 Wheat. 1, 213, that the federal license granted pursuant to the Enrollment and Licensing Act conveys an unequivocal authority to carry on the trade for which it was issued: “[t]he grant of the privilege \* \* \* convey[s] the right [to carry on the licensed activity] to which the privilege is attached.” The Court concluded that the Commerce Clause of the Constitution empowers Congress to grant such authority and that the authority so granted therefore was not subject to unreasonable interference by the states. Accordingly, the Court struck down a New York statute that, by conferring a steamship monopoly in state waters, excluded other federally licensed vessels from the coasting trade. Subsequent decisions have confirmed “[t]hat no State may completely exclude federally licensed commerce.” *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, 373 U.S. at 142. Washington’s ban on tankers in excess of 125,000 DWT violates that principle, for it completely excludes from Puget Sound an entire class of federally licensed and enrolled vessels.<sup>38</sup>

Moreover, Section 3(1) cannot be sustained as merely “impos[ing] upon federal licensees reasonable, nondiscriminatory conservation and environ-

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<sup>38</sup> Most of ARCO’s vessels were expected to be licensed by the time the Trans-Alaska Pipeline System began operation (A. 56).

mental protection measures otherwise within [the State’s] police power.” *Douglas v. Seacoast Products, Inc.*, No. 75-1255, decided May 23, 1977, slip op. 11. The tanker ban has not been shown to be reasonably related to the State’s avowed purpose of protecting Puget Sound from oil spills. There is no indication how the figure 125,000 DWT was arrived at (many tankers in excess of that weight have called at ARCO’s Cherry Point without incident (p. 3, *supra*)), and the State has stipulated (A. 84):

Experts differ and there is good faith dispute as to whether the movement of oil by a smaller number of tankers in excess of 125,000 DWT in Puget Sound poses an increased risk of oil spillage compared to the risk from the movement of a similar amount of oil by a larger number of smaller tankers in Puget Sound.

In short, given that Section 3(1) imposes “an absolute ban” (*Douglas v. Seacoast Products, Inc., supra*, slip op. 11) on federally licensed vessels over 125,000 DWT, and is as likely to defeat as to serve its purpose of protecting the marine environment from oil pollution, it does not fall among those “reasonable \* \* \* measures” that the states may impose upon vessels authorized by the Enrollment and Licensing Act to engage in the coastwise trade.<sup>39</sup>

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<sup>39</sup> Cf. *Kelly v. Washington*, *supra*, 302 U.S. at 15 (suggesting that under the Commerce Clause the states retain power to impose such regulations only if they are “plainly essential to safety and seaworthiness”).

**B. THE PWSA AND THE MERCHANT MARINE ACT OF 1936 PRECLUDE THE STATE FROM EXCLUDING VESSELS ON THE BASIS OF DEADWEIGHT TONNAGE**

Both Titles I and II of the PWSA preempt Chapter 125's ban on tankers of over 125,000 DWT. Section 101(3)(iii) of Title I authorizes the Secretary to control vessel traffic in hazardous areas or conditions by "establishing vessel size and speed limitations," and the legislative history of that Title indicates that Congress intended to vest that power in the Secretary to the exclusion of the states.<sup>40</sup> That power has been exercised by the Secretary's delegate in a manner that permits entrance into Puget Sound of vessels over 125,000 DWT.<sup>41</sup> By necessary inference, the State is without power to impose such a ban.

Moreover, Chapter 125's tanker ban can be likened in practical effect both to a mandatory safety equip-

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<sup>40</sup> See, e.g., the remarks of Congressman Keith that state laws "banning giant tankers" should not be permitted and that "[w]e do not want the States to resort to individual actions that adversely affect our national interest." Hearings on H.R. 867, H.R. 3635, H.R. 8140 (Ships and Vessels: Port and Harbor Safety) before the Subcommittee on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Committee on Merchant Marine and Fisheries, 92d Cong., 1st Sess. 30 (1971). See also *id.* at 32 (Congressman Tiernan stating that a state ban of large tankers would require "more vessels in carrying the fuels that we need for our demands in keeping the economy going").

<sup>41</sup> The Coast Guard Commander of the Vessel Traffic Center overseeing the Vessel Traffic System for Puget Sound (see note 9, *supra*) has determined that, in the Rosario Strait, no vessel of 70,000 DWT may pass another vessel of that size in either direction (A. 65). In adverse weather the limitation is reduced to 40,000 DWT (*ibid.*). No other size limitation is imposed.

ment requirement, which Section 102(b) of the PWSA, 33 U.S.C. (Supp. V) 1222(b), prohibits the states from imposing on vessels, and to a design and construction requirement, which, as we have shown (pp. 19-31, *supra*), is preempted by Title II of the PWSA. Neither the Secretary's currently effective regulations under Title II, nor those that he had proposed in response to the President's directive (see note 27, *supra*), includes a general ban on tankers over a certain size. Section 3(1) of Chapter 125 thus excludes vessels that the Secretary has determined may enter United States ports and frustrates Congress' objective of federal regulation of tanker design and construction standards.

Appellants suggest (Br. 52) that the depth of Puget Sound rather than Section 3(1) controls access of large tankers. But not all tankers in excess of 125,000 DWT have a draft beyond the Sound's ability to accommodate, as is evidenced by the number of such tankers that called at ARCO's Cherry Point refinery before Section 3(1) was enacted (p. 3, *supra*).<sup>42</sup> Nor is the number of vessels barred by the state law necessarily *de minimis*. The record shows that, as of

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<sup>42</sup> The controlling depth of Puget Sound is not a matter of record, and there is no fixed relationship between vessel deadweight tonnage and draft (A. 80). The record does show that the controlling depth of the Rosario Strait is at least 60 feet (A. 65), which, according to standard designs used by the United States at the 1973 International Conference on Marine Pollution, would accommodate tankers well in excess of 120,000 DWT (but less than 190,000 DWT) (A. 80).

December 1975, the world fleet contained 727 tankers over 125,000 DWT, representing 59 percent of the world's total oil tanker capacity, and an additional 344 vessels over 125,000 DWT were on order or under construction (A. 58).<sup>43</sup> While not all of these vessels are physically capable of navigating Puget Sound, some are, yet the Washington statute excludes them even though the Secretary has concluded that they might enter. The effect of Section 3(1) therefore is to nullify the Secretary's regulations and to intrude into a sensitive area of international concern in which Congress intended only the Secretary would act.<sup>44</sup>

As of January 31, 1976, approximately \$197 million in public funds under the Construction-Differential Subsidy program of the Merchant Marine Act had been expended for the construction of American tankers in excess of 125,000 DWT (A. 59).<sup>45</sup> Eight additional vessels of that size are currently under

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<sup>43</sup> ARCO's Cherry Point refinery is currently the only refinery in Puget Sound capable of accommodating fully loaded tankers with a draft of 55 feet or more (A. 50), but three of the five other oil companies with refineries on the Sound (Mobil Oil, Shell Oil, and Texaco) own and charter a substantial number of tankers in excess of 125,000 DWT (A. 53), and three (Mobil Oil, Shell Oil, and U.S. Oil & Refining) have plans under study to expand their docking facilities to accommodate tankers up to, respectively, 150,000, 200,000, and 125,000 DWT (A. 47-48).

<sup>44</sup> Each of the tankers in excess of 125,000 DWT that called at ARCO's Cherry Point refinery before enactment of Chapter 125 was a foreign-flag vessel (A. 31). As noted above (p. 27, *supra*), eighty-five percent of all tankers entering United States waters are of foreign registry.

<sup>45</sup> As of November 1, 1975, there were four tankers in the United States fleet over 125,000 DWT (A. 58).

construction contracts to be financed by \$313.6 million under that program (MarAd Annual Report, Appendix I, p. 80).<sup>46</sup> Chapter 125's tanker ban threatens the success of the construction subsidy program by barring from the Sound vessels built at great public expense. If each coastal state were free to impose its own limitation on the size of vessels entering its ports, leaving prospective ship purchasers uncertain whether their vessels would be able effectively to engage in the trade for which they were intended, existing orders might be cancelled and new construction under the program might be substantially reduced. By contrast, the Secretary of Transportation is obliged to consult with the Maritime Administration before imposing general limitations on vessel size (see note 32, *supra*), and his regulations therefore can be expected to accommodate rather than jeopardize the goals of the subsidy program. For all these reasons, the district court correctly held that Chapter 125's tanker ban is preempted by federal law.<sup>47</sup>

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<sup>46</sup> The cost of constructing one 150,000 DWT tanker is less than the cost of constructing two 75,000 DWT tankers (A. 63), and economies of scale permit large tankers to transport oil more cheaply than small ones (A. 63-64), resulting in a lower cost to the ultimate consumer.

<sup>47</sup> Appellants suggest (Br. 53) that the Deepwater Port Act of 1974, 33 U.S.C. (Supp. V) 1501 *et seq.*, which grants the coastal states a veto over the construction of nearby deepwater ports, indicates that Congress could not have meant in the PWSA to have deprived the states of the ability to ban tankers from already existing ports. But those two statutes, which were enacted at different times by different Congresses, do not purport together to constitute a fully integrated and comprehensive statutory scheme. The question of preemption in this case arises principally under

**CONCLUSION**

Chapter 125's tanker ban and its pilotage requirement with respect to enrolled and licensed vessels are preempted by federal law. The pilotage requirement with regard to registered vessels and the tug escort requirement are not preempted.

Respectfully submitted.

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JULY 1977.

the PWSA, which directly regulates vessel traffic and design and—unlike the Deepwater Port Act—reserves no role for the states with respect to its regulatory subject matter (with specific exceptions regarding shoreside structures and pilotage of registered vessels). If, as we have argued, the PWSA represents a considered congressional judgment to preempt, directly or by agency regulation, such state statutes as the tanker ban at issue here, the later Deepwater Port Act would be relevant only if it exhibited a specific legislative intent to change the balance of federal-state power struck two years' earlier in the PWSA. Since the Deepwater Act does not even speak to the regulatory subject matter of the PWSA, it could not, and does not, exhibit such an intent.

Supreme Court, U. S.  
FILED

MAY 14 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1976  
No. 76-930

DIXY LEE RAY, Governor of the State of Washington,  
*et al.*,  
*Appellants,*  
vs.

ATLANTIC RICHFIELD COMPANY, *et al.*,  
*Appellees.*

On Appeal From the United States District Court for the  
Western District of Washington

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IN THE  
**Supreme Court of the United States**

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October Term, 1976  
No. 76-930

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DIXIE LEE RAY, Governor of the State of Washington,  
*et al.*,

*Appellants,*

vs.

ATLANTIC RICHFIELD COMPANY, *et al.*,

*Appellees.*

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**On Appeal From the United States District Court for the  
Western District of Washington**

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**Brief of the State of California, Joined by the States  
of Alaska, Georgia, Hawaii, Missouri, Pennsylvania  
and Wisconsin, as Amici Curiae in Support of  
Appellants**

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**Interest of Amici Curiae**

The States filing this brief are vitally concerned with the outcome of this case. At stake is the historic police power authority of coastal states to impose reasonable regulations to protect environmentally sensitive estuarine waters from supertanker oil pollution.<sup>1</sup>

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<sup>1</sup>The State of Missouri, joining this brief, is not a coastal or Great Lakes state but is concerned about the adverse implications of the District Court's decision below on federal-state relations, especially in the area of police power regulation to protect the state's environmental quality. The States of Georgia, Hawaii, Pennsylvania and Wisconsin are coastal or Great Lakes states and are also concerned that their historic police powers over ship-to-shore pollution have been drastically curtailed by the District Court's opinion below.

The States of Alaska and California are particularly affected. With the advent of Alaskan oil, it has become clear that Alaska must assume the environmental burden of transporting by oil tanker, and the other Pacific Coast states—particularly California—must assume the environmental burden of receiving and passing inland through their coastal regions a significant portion of the nation's oil needs. Within the next several years, it is expected that 1.2 million barrels per day of Alaskan oil will be entering California via tanker. This amount will increase as the Alaskan outer Continental Shelf is explored, developed and put into production. Not only the higher volume of crude oil shipped but also the increasing size of super-tankers presents a growing potential for catastrophic oil spills that will cause serious damage to the coastal resources and marine environment of California, Alaska and other Pacific Coast states. California has 1,100 miles of coastal shoreline with innumerable bays, estuaries, coastal salt marshes and a rich and varied marine environment. These coastal marine resources comprise a priceless asset to California and the nation—not only in terms of natural beauty but also in terms of the tourism and fishing industry dollars that depend on the protection of the marine environment from major oil spills.

Alaska has over 33,000 miles of coastal shoreline. Alaska's coastal waters, including those above the outer Continental shelf, support one of the largest domestic and international fisheries in the world. To a substantial degree, Alaska's economy depends on the continuation of its fisheries. Alaska's coastal lands also contain this country's last and finest wildlife and wilderness assets. Alaska's future economy will also depend on

the ever-growing national demand for recreation and wilderness opportunities in these coastal lands. Alaska's coastal waters and coastal lands are a priceless treasure to Alaska and to the nation.

Several major tanker oil spills have occurred in the bays and estuaries of amici states. Coastal states have a vital interest in assuring that the highest available standards of safety in tanker design and traffic operation are adopted and implemented. The states filing this brief have no interest or desire to compete with the U.S. Coast Guard in regulating vessel safety and design and traffic control. However, where Congress has legislated requirements for tanker safety and for protecting coastal marine environments in a way that plainly permits cooperative and complementary regulation by coastal states, such coastal states have a compelling interest in implementing their historic police powers in a manner not inconsistent or in conflict with federal regulations in this area. Since the regulation of oil tankers to protect marine environments involves difficult economic, social and environmental policy choices, the states also have a vital interest in protecting their freedom to make these policy choices wherever such choices can be made without creating actual conflicts with the existing federal regulatory scheme or frustrating federal objectives.<sup>2</sup>

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<sup>2</sup>Like the State of Washington, Alaska has adopted legislation regulating oil tanker operations to minimize disastrous oil spills and to encourage—but not mandate—higher vessel design and equipment standards than currently required by the Coast Guard. Alaska Tank Vessel Traffic Regulation Act, AS 30.20.010 *et seq.* (1976) California is considering the adoption of similar legislation not in conflict with federal law. California Senate Bill 841 introduced April 6, 1977, by Senator Sieroty.

## Introduction

The State of Washington has adopted a law (Chapter 125, Laws of the State of Washington § 88.16.170 *et seq.* (hereafter Chapter 125) regulating supertanker operations in Puget Sound for the purposes of preventing oil spills that can cause long term damage to the estuary's unique marine environment.

The intent and purposes of Chapter 125 are set out in the first section:

*"Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.*

The legislature also recognizes Puget Sound and adjacent waters are a *relatively confined salt water environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.*

The legislature further recognizes that certain areas of Puget Sound and adjacent waters have *limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.*

For these reasons, it is important that large oil tankers be piloted by highly skilled persons who are familiar with local waters and that such tankers have sufficient capability for rapid maneuvering responses.

It is therefore the intent and purpose of RCW 88.16.180 and 88.16.190 to decrease the likelihood of oil spills on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ Washington state licensed pilots and, if lacking certain safety and maneuvering capability requirements, to be escorted by a tug or tugs while navigating on certain areas of Puget Sound and adjacent waters." Chapter 125, 1975 Laws of the State of Washington, § 88.16.170. (Emphasis added.)

There are three severable components to Chapter 125.

First, in Section 3(1)[§ 88.16.190(1)], all oil tankers between 40,000 dwt and 125,000 dwt are permitted entry into Puget Sound only if:

- (1) the oil tanker is in ballast (i.e., not carrying oil);
- (2) the oil tanker is escorted by a tug or tugs having an aggregate shaft horsepower equivalent to 5% of the tanker's deadweight tonnage; or, in the alternative, if
- (3) the oil tanker possesses the following standard safety features:
  - a. Shaft horsepower in the ratio of one horsepower for each 2½ deadweight tons, and
  - b. twin screws, and
  - c. double bottoms underneath all oil and liquid cargo compartments, and
  - d. two radars in working order and in operation, one of which must be collision avoidance radar, and

- e. such other navigational position location systems as may be prescribed by the Board of Pilot Commissioners.

Second, oil tankers larger than 125,000 dwt are prohibited from entering Puget Sound.

Third, in Section 2 [§ 88.16.180], all oil tankers including "enrolled" vessels between 50,000 dwt and 125,000 dwt are required by Chapter 125 to take on a Washington State licensed pilot while navigating Puget Sound and adjacent waters.<sup>3</sup> Oil tankers smaller than 40,000 dwt are exempted from the requirements of Chapter 125.

At the outset, it is important to clarify what Chapter 125 is *not*. It is not a state law prohibiting entry of supertankers over 125,000 dwt into all state waters. It carefully limits the prohibition to the ecologically-sensitive area of Puget Sound. It bears emphasizing that in January 1975 the Oceanographic Commission of Washington reported on three different places west of Puget Sound (hence not subject to Chapter 125) which the Commission considered reasonably developable as port sites capable of receiving supertankers larger than 125,000 dwt. Pretrial Order, ¶ 107. Chapter

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<sup>3</sup>The validity of the pilotage requirement is not addressed by this brief other than to summarize our view that states clearly may require State-licensed pilots on foreign and American vessels under register for foreign trade which enter state coastal waters. 46 U.S.C. § 211. It has recently been held that Congress granted the states the right to require state-licensed pilots on registered vessels "to promote navigational safety and to protect the environmental integrity of their coastlines (e.g., from oil spills caused by tankers running aground). . . ." *Warner v. Dunlap*, 532 F.2d 767, 772 (1976). Amici curiae states here contend that any portion of Washington's pilotage requirement deemed by this Court to be in conflict with 46 U.S.C. §§ 215, 364, is severable from the remaining valid provisions under the express severability section in Chapter 125.

125 also does not limit the development of deepwater ports offshore the Pacific Coast of Washington which would be capable of accommodating the world's largest supertankers. Indeed, Chapter 125's exclusion of larger tankers from the ecologically-sensitive Puget Sound is in furtherance of the intent and policy of Congress in enacting the Deepwater Port Act of 1974 to encourage the construction of deepwater ports for transferring oil and gas well offshore and to keep tankers away from our crowded inshore ports where the risk of environmental damage is greatest.<sup>4</sup>

Chapter 125 is also *not* a state law imposing design or equipment safety standards on vessels. Chapter 125 clearly permits tankers within the 40,000-125,000 dwt range to enter Puget Sound without having double bottoms, twin screws, collision avoidance radar or the shaft horsepower requirements which Chapter 125 sets out as alternatives to entry without tug escort assistance. Chapter 125's reference to vessel design (e.g., double bottoms) and equipment safety (e.g., collision avoidance radar) are legislative expressions of what the State of Washington would like to see voluntarily accomplished by new tanker construction proposed for use in Puget Sound and legislative expressions of how the State of Washington would like to see the federal statutory mandate for new tanker design and vessel equipment safety (in the Ports and Waterways Safety Act of 1972)<sup>5</sup> [hereafter "PWSA"] be implemented

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<sup>4</sup>P.L. 93-627; 33 U.S.C. § 1501; Senate Report No. 93-1217; 93rd Cong. 2d Sess., 1974 U.S. Code Cong. & Admin. News 7534, 7538, 7590, 7614; Conference Report No. 93-1605, 93rd Cong. 2d Sess., 1974 U.S. Code Cong. & Admin. News, 7624.

<sup>5</sup>P.L. No. 92-340, 33 U.S.C. § 1221 (Title I) and 46 U.S.C. § 391a (Title II).

by the Coast Guard with respect to the ecologically-sensitive needs of Puget Sound.

Chapter 125 is also not a state law aimed at protecting local economic interests nor does it impose undue burdens on interstate commerce disproportionate to the strong state interest in protecting the unique marine environment in Puget Sound under its historic police powers. Amici curiae emphasize that every port, harbor, bay and estuary throughout the world is unique in terms of its physical and ecological carrying capacity. A state police power regulation that imposes reasonable limits to protect that carrying capacity—even where incidental burdens on commerce result—is not invalid.

The District Court's opinion below holds that the federal Ports and Waterways Safety Act (PWSA) preempts the entire field of oil tanker regulation including vessel operations, traffic routes, pilotage, safety design and tugboat escorts. According to the District Court, the states may not regulate any aspect of this field under their historic police powers and also do not share with the federal government any of the regulatory authority over oil tankers enabled and mandated by the PWSA. This is a sweeping opinion which has suddenly removed from the states a great deal of their historically recognized police powers over coastal and harbor water uses for the protection of public health, safety, welfare and marine environmental quality.

It bears emphasizing that this is not a case involving questionable state interests. The state interests at stake here—the protection of Puget Sound from disastrous oil spills—are of a very high magnitude. Protecting the environmental quality of Puget Sound is essential to the continuing viability of the commercial fishing,

tourism and other recreation-based economies of northwest Washington. A majority of the state's residents live near Puget Sound. In these respects, the interests at stake touch on fundamental elements of the state's sovereignty.

The District Court's opinion below misreads Congressional intent in adopting the PWSA and blithely assumes that the existence of extensive federal legislation in the field and certain national or even international aspects of oil tanker regulation—by themselves—constitute a complete federal occupation of the field, without room for any complementary state regulation. This is a sharp departure from previous rulings by this Court involving the preemption doctrine. The District Court in effect presumed preemption without analyzing whether actual conflicts exist between the federal and state statutes, without analyzing whether the state statute frustrates federal purposes in the PWSA and without according a presumption of validity to the state statute which is designed to protect important state interests in the areas of environmental quality, public health and safety.

The District Court's decision is clearly overbroad and must be reversed.

#### Summary of Argument

The Ports and Waterways Safety Act (PWSA) does not preempt Chapter 125 of the Laws of the State of Washington, § 88.16.170 et seq. (hereafter Chapter 125). Chapter 125 is designed to protect Puget Sound from catastrophic oil spills caused by supertankers. This is a regulation based on the state's historic police powers to protect public health, safety and marine

environmental quality. Where, as in this case, the state interests to be protected are significant, Chapter 125 is presumptively valid unless it can be demonstrated clearly and unmistakably that Congress intended through the PWSA to occupy the entire field of oil tanker regulation, completely excluding complementary state regulation. In this case, the terms of Titles I and II of the PWSA do not expressly preempt the entire field of oil tanker regulation. The PWSA and its legislative history also fail to demonstrate any clear, unmistakable Congressional intent that oil tanker regulation to protect marine environmental quality be exclusively federal.

The subject matter of regulating oil tankers to protect environmentally sensitive bays, harbors, inland waterways and shorelines does not inherently require nationwide uniformity or federal primacy. While some elements of oil tanker regulation may be uniformly prescribed (e.g., vessel design standards), most elements of regulation are highly dependent on the unique features and conditions present in each bay, harbor or operating area (e.g. vessel traffic routes). The District Court's opinion below, in ruling exclusive federal control over the subject matter, ignores these realities and prevents the states from innovating and participating in a cooperative regulatory process, in an area that traditionally has been subject to state police power.

Nor is Chapter 125 preempted on the basis of actual conflicts with the PWSA and its implementing Coast Guard regulations. The provision in Chapter 125 banning supertankers over 125,000 dwt is fully compatible with the Coast Guard's existing Vessel Traffic System regulations for Puget Sound. The Coast Guard regula-

tions do not by themselves license operation of supertankers in Puget Sound; rather they are limited to requirements for vessel position reporting, communications and control over vessel movements. Vessel size is not a factor in the Coast Guard regulations. The optional design and equipment/tug escort provisions in Chapter 125 also present no actual conflicts with existing Coast Guard regulations or the PWSA. The Coast Guard has not issued any regulations governing tug escorts in Puget Sound and oil tankers can comply with the Coast Guard Vessel Traffic System rules while also complying with the tugboat escort requirements of Chapter 125. The design and equipment provisions in Chapter 125 are clearly optional—they represent Washington's preference not its mandate for oil tanker design.

Chapter 125 does not frustrate any federal purposes in the PWSA or related federal legislation. The supertanker ban provision is fully consistent with federal policy in the Deepwater Port Act, encouraging the very large tankers to stay out of confined, inland waters like Puget Sound. The design and equipment preference provisions in Chapter 125 do not frustrate federal purposes since, to the extent that the Coast Guard has not yet acted to mandate the same or more stringent design and equipment requirements, any oil tankers voluntarily constructed to meet Washington's preferences will comply with the Coast Guard's minimum standards and will be anticipating what the federal government may soon require.

Chapter 125 also does not violate the Commerce Clause of the United States Constitution. First, the State of Washington's interest in protecting marine environmental quality in Puget Sound is of a high magni-

tude. Second, any economic burdens on interstate transportation of oil, caused by Chapter 125's tug escort and supertanker ban are very small. Compliance with Chapter 125's provisions by Appellees and other oil companies has not caused any reduction in the amount of oil processed at Puget Sound refineries. In cases such as this, where a state exercises its historic police powers in a reasonable way to protect public health, safety and marine environmental quality, the state regulatory action has been upheld even where (unlike this case) there is a material interference with interstate commerce.

## ARGUMENT

### I

#### Chapter 125 Is Not Preempted by the Ports and Waterways Safety Act

In cases such as this, where the subject matter that Congress is claimed to have preempted has been traditionally regulated by the states, this Court has always started with ". . . the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In determining whether Congress has unmistakably ordained exclusive federal regulation in the field, this Court has looked at the federal statute's language, its legislative history and the statute's implicit structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Where the federal statute does not expressly preempt the subject matter, this Court's decisions have analyzed the federal and state statutory schemes to determine if the state statute actually conflicts with the federal law, meaning that a state regulatory exercise in the same field would be "absolutely and totally contradictory and repugnant" with the federal statutory scheme. *Goldstein v. California*, 412 U.S. 546, 553 (1973). This Court has also looked to see if the subject of the regulation reveals an inherent need for nationwide uniformity and federal primacy. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 297, 319-20 (1851). However, this Court has reiterated its view that "the exercise of federal supremacy is not lightly to be presumed."

*New York State Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973). Where strong state interests—such as the prevention of oil pollution in coastal waters—are at stake, *Askew v. American Waterways Operators*, 411 U.S. 325, 343 (1973), or where coordinate state and federal efforts co-exist in pursuit of common purposes, *New York, etc. v. Dublino, supra*, at 421, this Court has expressed its

"conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

Applying these principles to the facts in this case, it will be evident that Chapter 125 of the Laws of the State of Washington, § 88.16.170 et seq. is a valid exercise of the State's police power, not in conflict with nor preempted by the Ports and Waterways Safety Act.

**A. Titles I and II of the Ports and Waterways Safety Act Do Not Expressly Preempt Chapter 125**

Where Congress has intended a complete ouster of State regulation in a given field, it has not been hesitant in clearly saying so. For example, in the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 et seq., Congress expressly preempted the field of adopting and enforcing new car emission standards to prevent air pollution:

**“§ 1857f-6A State Standards**

(a) No State or any political subdivision thereof shall adopt or attempt to enforce any standard

relating to the control of emissions from new motor vehicle engines to this part. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new vehicle engine as a condition precedent to the initial retail sale, titling (if any) or registration . . . ."

There is no provision in Title I or II comparable to the clear legislative expression of preemption in the Clean Air Act Amendments of 1970 which we have referenced.

The PWSA contains only one reference to State standards. In Title I (33 U.S.C. § 1222(b)) relating to "prevention of damage to vessels, bridges, and other structures" and "protection of navigable waters from environmental harm" (emphasis added), Congress said:

*"Authority under other provisions and better Safety requirements prescribed by other agencies unaffected."*

(b) Nothing contained in this chapter supplants or modifies any treaty or Federal statute or authority granted thereunder, nor does it prevent a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this chapter." (Emphasis added.)

Appellees argue that Title I's savings clause for more stringent state standards is "for structures only" and that this constitutes an express federal preemption of state regulations over "vessels". But this is a savings clause and not a provision for express preemption. The plain meaning of this savings clause is to allow

the states to impose higher or more stringent safety equipment requirements or safety standards—in a relatively narrow field, “for structures only”—than any existing Coast Guard regulations on the same subject. The savings clause does not prevent the states from exercising their traditional regulatory authority over vessel operations in harbors, bays, and inland waters, where the Coast Guard has not yet acted to regulate. There is an important distinction between federal legislation prohibiting the states from taking any regulatory action at all in a particular field (even where the federal agency has not acted), and prohibiting the states from taking regulatory action governing a specific subject only after the federal agency has acted to regulate that specific subject. Absent express language prohibiting the states from taking any regulatory action at all over vessel operations, preemption would have to be presumed from the statutory language or legislative history. But as this Court recently said:

“It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.” *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952).

In *Dublino, supra*, this Court noted that twenty-one states had adopted Aid to Families with Dependent Children programs at the time of the federal statute’s (Work Incentive Program or WIN) enactment; thus,

any Congressional intention to supersede existing state work rules “would in all likelihood have been expressed in direct and unambiguous language.” *New York, etc. v. Dublino, supra*, 414. Similarly, given the fact that the Coastal and Great Lakes states, since their inception, have exercised police power authority over vessel operations in bays, harbors and other confined coastal waters (*see Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328-329 (1973)), if Congress had intended through the PWSA a complete ouster of state regulatory authority it would have expressed its intention in the same kind of unequivocal terms that it used, for example, in the Clean Air Act Amendments of 1970 governing new car emission standards.

Appellees, however, cite legislative history on Title I’s savings clause [33 U.S.C. § 1222(b)] in arguing that Congress intended to forbid any state regulation at all over vessel operations even where the Coast Guard had not acted to regulate. Appellees’ *Motion to Affirm*, pages 11-12. Despite the existence of some statements in the legislative history arguably supporting Appellees’ view, a review of the legislative history demonstrates at most a Congressional intent to preclude higher or more stringent state regulations over vessel equipment which, like navigation and communication equipment, require uniformity to avoid federal-state conflicts, e.g., the radio frequency over which an oil tanker must communicate. See, e.g., *Hearings Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant*

*Marine and Fisheries on H.R. 867, H.R. 3635, H.R. 8140, and H.R. 6232, 92nd Cong., 1st Sess. 141, No. 92-12 (1971); House Report on H.R. 8140, 92nd Cong., 1st Sess. 15, Report No. 92-563 (1971).*<sup>6</sup>

The legislative history of Title I of the PWSA shows that it was intended to clarify the Coast Guard's authority to regulate port safety and, specifically, to establish and operate vessel traffic control systems as the Coast Guard deems appropriate. Prior to PWSA Title I's enactment in 1972, the Coast Guard's regulatory authority over vessel and port safety was based on the Tank Vessel Act of 1936, 49 Stats. 1889 [authority to issue regulations governing vessels carrying "combustible cargoes"] and on 46 U.S.C. § 170 [authority to regulate vessel transportation of explosives or dangerous substances including oil]. This latter enabling legislation expressly waived preemption as to local regulations ". . . not inconsistent or in conflict with this section . . ." 46 U.S.C. § 170(7)(d). The Coast Guard also regulated port safety under the President's delegation of his authority to regulate the movement, inspection and guarding of vessels, harbors, ports and waterfront facilities upon the President's determination that national security required such regulation. Magnuson Act, 50 U.S.C. § 191. Both the Tank Vessel Act of 1936 and the Magnuson Act, while not waiving preemption, contain no language expressing or implying federal preemption of port safety. Even as Title I

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<sup>6</sup>For example, in discussing the reason for adding the phrase "for structures only" to Title I's savings clause [33 U.S.C. § 1222(b)], the House Report pointed to the Coast Guard's testimony "...that it was their intention that higher vessel equipment regulations and standards by states should apply to structures only and not to vessels." *House Report, supra*, 15, No. 92-563 (1971) (emphasis added).

was adopted to clarify the Coast Guard's authority to regulate port safety (and obviate the need to rely on the questionable "national security" enabling provisions of the Magnuson Act), it was apparent that state and local regulations over port safety would continue to play an important role. For example, the Coast Guard Commandant testified that:

"The primary concern for the safeguarding of waterfront facilities and vessels has been and continues to be a matter of local concern. This legislation will in no way affect that primary responsibility . . . Local regulations would continue to set forth requirements to assure port, harbor, waterways and facility protection" (emphasis added). *Hearings Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries on H.R. 17830, H.R. 18047, H.R. 15710, 91st Cong., 2d Sess. 17-18 (No. 91-34)* (1970).

The legislative history of PWSA Title I, considered in the context of earlier Congressional enactments which either expressly waived preemption or were silent on preemption, simply fails to demonstrate a Congressional intent to preempt the entire field of oil tanker regulation.

The ambiguous legislative history on the extent and degree of Congressional intent to preempt the states under the PWSA is further obscured by Senator Warren Magnuson's statement commenting on the District Court's decision below:

"As sponsor of that Act [the PWSA] in the Senate, I have made known my disagreement with

the decision. I think it is wrong; I feel the Court has simply misread the intent of Congress as contained in the Ports and Waterways Safety Act. The weakness of the decision is highlighted by the complete absence of any analysis of the terms of the Act. The Court's reasoning was simplistic at best. Preemption is not favored in the law. Congress must show a clear intent to preempt before such a finding is made. This Court summarily reached its decision on the thinnest of reasoning. I say they are wrong." 121 Cong. Rec. S. 17575 (daily ed., October 1, 1976).

Furthermore, the District Court's opinion below did not rely on language of express preemption in Title I or on Title I's legislative history to support its ruling that the entire field of oil tanker regulations is preempted by the PWSA.

In summary, Title I of the PWSA is enabling legislation, authorizing but not mandating the Coast Guard to establish and operate vessel traffic control systems as it deems appropriate. This is only a limited area in the broader field of oil tanker regulation and does not include Chapter 125's ban on supertankers over 125,000 dwt nor Chapter 125's tug escort requirement.

Title II of the PWSA, unlike the permissive Title I, mandates the Coast Guard to adopt minimum design and construction standards for oil tankers. Title II also contains no express language of preemption and, in fact, is silent on the authority of the states to regulate oil tanker design and construction.

Thus, neither Title I nor Title II of the PWSA contain express language preempting the states from regulating oil tanker operations in the absence of Coast

Guard regulations on the same specific subject. Nor does the legislative history of the PWSA unequivocally show a congressional intent to preempt the entire field of regulating oil tanker operations.

**B. Congress Has Not Completely Occupied the Field of Regulating Oil Tanker Operations to the Exclusion of Compatible State Regulation**

The principal basis for the District Court's opinion below holding Section 3 of Chapter 125 preempted by the PWSA, was the District Court's view that the PWSA establishes such a comprehensive federal scheme for regulating oil tankers that no room was left for any state regulation. The District Court pointed, for example, to the PWSA enabling authority in Title I, 33 U.S.C. § 1221(3)(iv), permitting the Coast Guard to require tugboat escorts and to restrict and even exclude tankers from Puget Sound under adverse or hazardous conditions. The fact that the Coast Guard has not yet acted to regulate these aspects of oil tanker operations seemed immaterial to the District Court because the comprehensiveness of the PWSA somehow demonstrates a Congressional intent to occupy the entire field without allowance for compatible State regulation. However, in *De Canas v. Bica*, 424 U.S. 351 (1976), this Court held that the comprehensive scope and level of detail in the federal Immigration and Nationality Act (INA) did not, in itself, preempt a state regulation prohibiting employees from knowingly hiring illegal aliens. This Court said:

"The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the employment of illegal aliens as 'plainly within

. . . [that] central aim of federal regulation." *De Canas v. Bica, supra*, 359, quoting *San Diego Unions v. Garmon*, 359 U.S. 236, 244 (1959).

Similarly, in *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973), the pervasiveness of the federal WIN work rules in the Social Security Act was said by this Court to be insufficient in itself to demonstrate a Congressional intent that the federal law was to be exclusive:

"The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem . . ." *Dublino, supra*, 415.

The District Court erred in inferring a Congressional intent to preempt the entire field of oil tanker regulation based on the comprehensiveness of the PWSA. Given the complexity of the subject matter addressed by Congress in the PWSA, a detailed statutory scheme was both likely and appropriate—completely apart from any questions of preemptive intent.

**C. The Regulation of Oil Tanker Operations Is Not a Subject That Is Inherently National or Requires Only One Uniform System**

Related to its view that the very pervasiveness of the PWSA implies a Congressional intent to occupy the field of oil tanker regulation, the District Court's opinion below also rested its preemption holding on its view that the purpose of the Tank Vessel Act (PWSA Title I's predecessor) and Title II of the

PWSA ". . . was to establish a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions under which they would be permitted to operate. Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA." *ARCO v. Evans*, .... F.Supp. ...., 9 ERC 1876, 1878; 7 E.L.R. 20071-20072 (1976). Arguing in the same direction, Appellees try to convey the impression that the subject of regulating oil tanker operations has long been an area of federal predominance.

However, there is nothing inherent in the subject of regulating oil tanker operations that requires national, uniform treatment. Rather, the regulation of oil tanker operations to prevent or minimize oil spills is highly dependent on unique and differing local navigational features, weather and traffic conditions and environmental quality in each bay, harbor and coastal waterway. What was said by this Court in upholding Louisiana's maritime quarantine regulations is also applicable to this case:

"The matter is one in which rules that should govern it may in many respects be different in different localities, and for that reason may be better understood and more wisely established by local authorities. The practice which should control the quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York." *Morgan's Railroad and Steamship Co. v. Louisiana*, 118 U.S. 455, 465 (1885).

The uniqueness of each harbor and differing local needs respecting navigation are exactly the reasons for this Court's decision in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), holding that vessel pilotage was not a subject requiring nationally uniform rules. Since *Cooley*, innumerable cases have upheld the validity of state police power regulatory authority over various aspects of vessel operations, navigation and protection of marine environmental quality. *Packet Co. v. Catlettsburg*, 105 U.S. 599 (1882); *Morgan's Railroad and Steamship Co. v. Louisiana*, 118 U.S. 455 (1885); *Lawton v. Steele*, 152 U.S. 133 (1893); *Kelly v. Washington*, 302 U.S. 1 (1937); *Skiriotes v. Florida*, 313 U.S. 69 (1940); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

The PWSA and the Coast Guard regulations thereunder recognize that the regulation of oil tanker operations is not susceptible to national uniformity. Title I of the PWSA, for example, gives the Coast Guard discretionary authority to establish vessel size limits and operating conditions "in areas [the Coast Guard] determines to be especially hazardous or under conditions of reduced visibility, adverse weather, vessel congestion or other hazardous circumstances." 33 U.S.C. § 1221(3). Obviously, if the Coast Guard ever decides to exercise its authority in this limited area, its discretionary decision will be highly dependent on local conditions. Similarly, Title I provides that Coast Guard rulemaking over vessel operations ". . . shall, among other things, consider—

- (1) The scope and degree of hazards;

- (2) Vessel traffic characteristics . . .;
- (3) Port and waterway configurations and the differences in geographic, climatic, and other conditions and circumstances;
- (4) Environmental factors;
- (5) Economic impacts and effects;
- (6) Existing vessel traffic control systems, services and schemes; and
- (7) Local practices and customs . . ." 33 U.S.C. § 1222(e).

Thus, Title I of the PWSA clearly recognizes that the diversity of local port and coastal waterway conditions will necessarily result in a diversity of tailor-made regulations over oil tanker operations rather than uniform, national rules.

Similarly, Title II of the PWSA and Coast Guard implementing regulations contemplate that the Coast Guard's "minimum" design and equipment safety standards for oil tankers are functionally dependent on diverse navigational conditions in harbors and waterways. For example, the Coast Guard explained its decision not to mandate double bottoms for oil tankers on a national basis, in part, because:

"[T]he surrounding physical characteristics of a port area have a great deal to do with accident types to be anticipated. Where channels are wide and the water deep, collisions would be expected to dominate. Where water is shallow with respect to using vessels' drafts, groundings should be expected. There is a wide diversity of conditions encountered in U.S. ports and even with individual port areas." United States Coast Guard, *Final*

*Environmental Impact Statement on Regulations  
for Tank Vessels Engaged in the Carriage of  
Oil in Domestic Trade 73 (August, 1975).*

Nevertheless, the Coast Guard design regulations include double bottoms as one way new oil tankers can be constructed to minimize accidental oil spills.<sup>7</sup>

In summary, there is nothing inherently national about the subject matter of regulating oil tanker operations. Uniform national rules applicable to all oil tankers are not contemplated by the PWSA except in the limited area of setting minimum vessel equipment and design standards; however, even in this limited area, the Coast Guard recognizes that higher design standards may be necessary for certain areas. In any event, Section 3 of Chapter 125 does not mandate vessel design and equipment standards, nor does it frustrate the federal purposes of giving the Coast Guard the duty of initially setting minimum design standards.

**D. Chapter 125 Does Not Present Actual Conflicts With the PWSA and Coast Guard Regulations Thereunder**

In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), the plaintiff vessel owners argued that Detroit's smoke abatement ordinance, as applied to ships, was preempted by a comprehensive system of regulation enacted by Congress to provide for vessel equipment (including boilers) inspection, approval and licensing. The argument was simply that if a vessel's boilers had been licensed by the comprehensive federal regulatory system, a city could not forbid the operation of such boilers. Noting that there was no actual conflict between the purpose of Detroit's smoke abatement ordi-

<sup>7</sup>See note 9, *infra* page 28.

nance (pollution control) and the purpose of the federal licensing program for ships' boilers (safety), this Court upheld the validity of the Detroit ordinance saying that Congressional intent to preempt ". . . is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state." *Huron, supra*, 443. Accord, *Askew v. American Waterways Operators*, 411 U.S. 325, 327 (1973).

Similarly, in this case, Sections 3(1) and 3(2) of Chapter 125 [the prohibition of oil tankers over 125,000 dwt from Puget Sound, and the Tug Escort requirement] are fully compatible and not in conflict with the federal purposes of the PWSA and Coast Guard regulations adopted thereunder.

Both Chapter 125 and the PWSA have the same purpose—to prevent or minimize accidental oil spills in order to protect marine environmental quality. Chapter 125 simply regulates oil tanker operations in specific ways not regulated by the Coast Guard. The Coast Guard has established and operates the Puget Sound Vessel Traffic System. 33 C.F.R., Part 161. But the Coast Guard's regulations are essentially limited to establishing communication rules, vessel movement reporting requirements, and vessel separation and traffic lanes. The Coast Guard's Puget Sound Vessel Traffic System neither authorizes entry of supertankers over 125,000 dwt into Puget Sound nor does it impose size limits of any kind on oil tankers.

There are only two references to vessel size in the PWSA: 1) the Coast Guard's permissive authority to control vessel traffic in areas it determines are "especially hazardous" by *inter alia* establishing vessel size limitations—33 U.S.C. § 1221(d)(iii); and 2) Congress's

directive to the Coast Guard that, in adopting vessel regulations, it shall consider various factors including "the sizes and types of vessels." 33 U.S.C. § 1222(e) (2). These statutory references to vessel size by their terms do not present a conflict with Chapter 125. The Coast Guard's regulations also do not impose tug escort requirements of any kind on oil tankers.<sup>8</sup> Chapter 125's tug escort/optional design requirements do not present any conflicts with the Coast Guard's vessel traffic lanes and separation zones. Rather, the tug escort/optional design requirements of Chapter 125 provide added protection against contingencies—loss of ship's power and maneuverability—which the Coast Guard traffic lane regulations do not address.

Chapter 125's optional vessel design and safety equipment standards also do not conflict with the PWSA and/or existing Coast Guard regulations:

First, they are optional, not mandatory. Even the most anciently designed federally licensed tankers can come into Puget Sound so long as they are attended by a tug escort (if between 40,000 and 125,000 dwt).

Second, Chapter 125's double bottom option is consistent with the Coast Guard's own regulations. The Coast Guard has expressly said that the use of double bottoms is one of six ways for a tanker to comply with the Coast Guard's segregated ballast requirement.<sup>9</sup> Chapter 125's optional double bottom require-

<sup>8</sup>The Coast Guard has published an Advance Notice of proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976) indicating that it is considering adoption of tug escort requirements.

<sup>9</sup>40 Fed. Reg. 48289, 48290 (October 14, 1975). The Coast Guard's segregated ballast requirement was adopted, essentially unchanged from its proposed form, in 41 Fed. Reg. 1479 (January 8, 1976).

ment is also consistent with the Secretary of Interior's commitment to Congress that oil tankers serving the marine transport leg of the Trans-Alaska Pipeline would incorporate double bottoms.<sup>10</sup>

States still have the power to encourage higher vessel standards for the unique needs of their marine environments. Certainly, it cannot be said that Congress, in the PWSA, has preempted the field of voluntary cooperation by shipbuilders to construct ships with double bottoms, greater shaft horsepower and other improvements not presently required by Coast Guard design regulations. While no tankers exist which meet the option design and equipment standards in Chapter 125 (Pretrial Order ¶ 75), a number of existing tankers and tankers under construction have or will have many of the safety features in Chapter 125 and have or will have higher design standards than the Coast Guard's minimum requirements under PWSA.<sup>11</sup> Clearly, a trend is underway toward the construction of

<sup>10</sup>In testimony before the Joint Economic Committee on Natural Gas Regulation and the Trans-Alaska Pipeline, June 22, 1972, Secretary Rogers C. B. Morton explicitly stated:

"Newly constructed American flag vessels carrying oil from Port Valdez to United States ports will be required to have segregated ballast systems, incorporating a double bottom, which will avoid the necessity for discharging oily ballast to the onshore treatment facility."

See also letter of Secretary of the Interior Rogers Morton on S. 1081 to all members of the Senate, April 6, 1973, 1973 U.S. Code Cong. & Admin. News 2509, 93rd Cong. 1st Sess. ". . . we are insisting that operation of the maritime leg [of the Trans-Alaska Pipeline] be safer than any other oil transportation system now in operation."

<sup>11</sup>Pretrial Order ¶ 63. More than 20 double bottom tankers are on order or under construction in the United States. *Hearings Before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 93rd Cong. 1st Sess. 247-252 (Serial No. 93-16, June 6, 7, and July 18, 19, 1973).

oil tankers having the kinds of optional design and equipment features in Chapter 125. Chapter 125 encourages and anticipates this trend and clearly does not frustrate any federal policies or purposes in the area of oil tanker design and equipment.

A careful analysis and comparison of Chapter 125's requirements and existing Coast Guard regulations over oil tanker operations demonstrates that it is physically possible for oil tankers to comply with both the state and federal schemes. The record supports the conclusion that oil tankers operating in Puget Sound have complied with both Chapter 125 and the Coast Guard regulations without encountering federal or state enforcement actions and without making it impossible, let alone unduly burdensome, to engage in interstate commerce. Pretrial Order ¶¶ 13, 77, 78, 79. There are thus no conflicts, as defined by this Court in *Florida Avocado Growers v. Paul*, 373 U.S. 132, 143 (1963), between Chapter 125 and federal law.

**E. The Coastal Zone Management Act, Federal Water Pollution Control Act and Deepwater Port Act Provide for Coordinated State and Federal Actions to Prevent Oil Spills in Coastal Waters**

"Where coordinate state and federal efforts exist within a complementary framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one." *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 421 (1973).

That the PWSA does not purport to provide the exclusive remedy to the problem of reducing oil spills in state coastal marine environments like Puget Sound can also be demonstrated by examining related federal

legislation in the field, which expressly gives the states a responsibility and a role in protecting water quality, planning tanker facilities and protecting shoreline environmental quality.

The Water Quality Improvement Act of 1970, now a part of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, 1321, *et seq.*, provides:

"Nothing in this section shall be construed as preempting any state or political subdivision thereof from *imposing any requirement* or liability with respect to the discharge of oil or hazardous substance into any waters within such State." 33 U.S.C. § 1321(o)(2). (Emphasis added.)

The role and responsibility of the states in cooperating with the federal government to prevent and eliminate oil pollution in state coastal waters is underscored in the Congressional declaration of goals and policy in the Federal Water Pollution Control Act:

"It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States to prevent, reduce and eliminate pollution*, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this chapter. . . ." 33 U.S.C. § 1251(b). (Emphasis added.)

The Congressional policies in the Federal Water Pollution Control Act clearly indicate that *both* the states and the federal government are to work cooperatively to prevent, reduce and eliminate oil pollution in coastal waters.

The Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*, provides another illustration of this point. Congressional findings include:

"(g) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate; and

(h) The key to more effective protection and use of the land and water resources of the coastal zone *is to encourage the states to exercise their full authority over the lands and waters in the coastal zone* by assisting the state, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone . . ." 16 U.S.C. § 1415(g)(h). (Emphasis added.)

"The Congress finds and declares that it is the national policy . . . (b) to encourage and assist the States to exercise effectively their responsibilities in the coastal zone . . ." 16 U.S.C. § 1452.

The Coastal Zone Management Act provides federal funding to states toward the development of comprehensive coastal zone management programs or plans. 16 U.S.C. § 1454. Washington state laws aimed at preventing and eliminating water pollution, including Chapter 125, are integral parts of the Washington Coastal Zone Management Plan. Once completed, a state coastal zone plan is submitted to the Secretary of Commerce for approval and, if approved, federal agencies conducting or supporting activities in the coastal zone "shall

conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. §§ 1454-1455; 1456(c)(1). Pursuant to this law, the State of Washington has submitted and received federal approval of its coastal zone management plan.

Related to the Coastal Zone Management Act is the Estuarine Areas Act of 1968, 16 U.S.C. § 1221 *et seq.* This Act provides:

" . . . it is declared to be the policy of Congress to recognize, preserve, and protect *the responsibilities of the States in protecting, conserving, and restoring the estuaries of the United States.*" 16 U.S.C. § 1221. (Emphasis added.)

Puget Sound is an estuary. Pretrial Order ¶ 81.

The Costal Zone Management and Estuarine Areas Acts make it clear that states have the primary responsibility to use the full range of their historic police powers and other powers to protect estuarine areas like Puget Sound from oil spills. The Congress plainly could not have assigned to the states these powers and responsibilities to protect water quality in bays and estuaries like Puget Sound and, at the same time, have intended that the states are completely ousted from the field of regulating tanker operations in bays and estuaries to protect marine environmental quality.

The Deepwater Port Act of 1974, 33 U.S.C. § 1501, *et seq.*, is also relevant. This law provides a comprehensive scheme for regulating the location, ownership, construction and operation of deepwater ports in waters beyond the territorial limits of the United States and to

"(2) provide for the protection of the marine and coastal environment to prevent or minimize any adverse impact which might occur as a consequence of the development of such ports; and

\* \* \*

(4) protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law." 33 U.S.C. § 1501 (a)(3).

The Deepwater Port Act expressly gives the states a veto power over proposed deepwater ports located *outside* the three-mile limit of state coastal waters. 33 U.S.C. § 1508(b)(1). Congressional action giving state authority to veto deepwater ports proposed for location *outside* state waters clearly indicates that states are not to be denied similar authority with respect to deepwater ports proposed for location *inside* the three-mile limit, particularly where it is reasonable to anticipate that greater environmental damage would occur from tanker related oil spills. Senate Report No. 93-1217, 92d Cong. 2d Sess., 1974 U.S. Code Cong. & Admin. News, p. 7538.

In providing a comprehensive scheme for locating deepwater ports for supertankers outside the three-mile limit, Congress recognized that in this era of increasingly larger supertankers a new kind of port facility was required and that larger supertankers should be kept out of crowded bays, estuaries and ports by encouraging a safer alternative—the deepwater port. Senate Report No. 93-1217, *supra*, p. 7614. In this respect, the Deepwater Port Act shows both 1) that Chapter 125's 125,000 dwt size limit for supertankers in Puget Sound

is consistent with federal policy, and 2) that Congress intended the states to play a major role in regulating potential sources of oil spills in state coastal waters.

These recent federal environmental laws underscore an overall Congressional policy and intent to give states the opportunity to regulate marine environmental quality *cooperatively* with federal agencies, and to uphold state regulatory efforts unless they clearly are in conflict with or obstruct federal purposes and laws.

## II

### Chapter 125 Does Not Violate the Interstate Commerce Clause

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. \* \* \* If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). (Emphasis added.)

This case does not involve tenuous state interests such as the state's concern over a specified shape of truck mudguards in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 525 (1959).

The State of Washington has a legitimate public interest in regulating tanker traffic in Puget Sound.

The uncontested facts in this case show that Puget Sound is a unique estuary of great ecological, aesthetic and economic value to the people of Washington as well as to the nation. Pretrial Order ¶¶ 81, 83, 85-92, 94-98, 100-106. Puget Sound is also unique in terms of its physical, meteorological, navigational and ecological carrying capacity. Pretrial Order ¶¶ 82, 84, 108. Estuaries like Puget Sound are altogether different from open sea coastal waters or the high seas in that an estuary's physical, navigational and ecological carrying capacity cannot be protected with the same uniform regulatory measures applied to open sea waters or even other estuaries. Each estuary poses unique circumstances requiring tailor-made regulatory measures. It is therefore worth emphasizing that the subject of estuarine environmental quality neither requires nor is capable of uniform regulatory treatment. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

The State of Washington clearly may utilize its police powers over shoreline facilities such as tanker terminals as a traditional exercise of police power over land use—limited only by the requirements that the land use control not be arbitrary or irrational, nor impose an undue burden on interstate commerce, and that it be enacted for a proper public purpose. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Huron Portland Cement v. Detroit*, 362 U.S. 440, 442 (1960) [protection of public health through preservation of environmental quality is a valid and indeed primary objective of the police power]; *Askew v. American Waterways Operators*, 411 U.S. 325, 343 (1973) [sea to shore pollution is historically within the reach of the police powers of the states]. *Construction Indus-*

*try Assoc. of Sonoma County v. City of Petaluma*, 522 F.2d 897 (1975), cert. den. 424 U.S. 934 (1976). As previously pointed out, federal legislation in the area of estuarine and coastal zone environmental protection makes clear that the states have primary responsibilities and powers in this area, particularly with respect to onshore facilities that may impact on water quality.<sup>12</sup> Thus, the State of Washington could legitimately regulate oil tanker facilities in Puget Sound e.g., by limiting the size of tanker facilities, refineries and oil storage tanks in order to insure that very large tankers not utilize Puget Sound (assuming again that this would not impose an undue burden on interstate commerce). Chapter 125's tanker size limit in reality is a direct method of doing what the State of Washington could do indirectly through its shoreline management police powers. In this respect, Chapter 125's tanker size limit is equivalent to an exercise of the State's zoning power.

The question remains whether this kind of limitation on supertankers above 125,000 dwt constitutes an "undue" burden on interstate commerce. It bears emphasizing that Chapter 125 by its terms does not prevent supertankers above 125,000 dwt from entering Washington's coastal waters or port facilities elsewhere. The Pretrial Order, ¶ 26, brings out the fact that the Northern Tier Pipeline Company has announced plans to construct an oil transfer terminal at Port Angeles,

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<sup>12</sup>In the Senate Report on the Deepwater Ports Act of 1972, the Committee, speaking about the state role, said:

"States clearly have regulatory control over construction of onshore port-related facilities. And under the Submerged Lands Act and pursuant to the U.S. Constitution (10th Amendment), the States have either exclusive or concurrent authority with the Federal Government over most activities within the 3-mile limit." *Senate Report No. 93-1217*, supra, 7538.

Washington [not covered by Chapter 125] capable of receiving tankers in excess of 125,000 dwt. The Port Angeles terminal would connect, via a submarine pipeline of approximately 1.5 miles, with a pipeline to be constructed around Puget Sound, east across the State of Washington and to refineries in the midwest. Pretrial Order ¶ 26. The Pretrial Order ¶ 107 also brings out the fact that there are at least three potential sites outside Puget Sound, in Washington State, capable of receiving tankers in excess of 125,000 dwt. Chapter 125 clearly is not a law that prohibits all entry of supertankers over 125,000 dwt into Washington State. Although the tanker size limit in Puget Sound may well make transportation of crude oil to ARCO's Cherry Point refinery and other refineries located in Puget Sound more expensive, such additional expense is not excessive. Pretrial Order ¶ 68. More important, since Chapter 125 became effective in September 1975, all six oil companies operating refineries in Puget Sound have used tankers of less than 125,000 dwt (although prior to Chapter 125, 15 tankers larger than 125,000 dwt were received at ARCO's Cherry Point refinery; Pretrial Order ¶ 18), and yet "to the present time, *no reduction in the amount of oil processed at Puget Sound refineries has occurred as a result of the enactment of HB 527 [Ch. 125].*" Pretrial Order ¶ 79. (Emphasis added.)

Thus, while the tanker size limitation for Puget Sound may result in some increase in the cost of oil transportation to Puget Sound refineries, it has not caused a reduction in commerce. The increase in cost, however, must be weighed against the important ecological, aesthetic and economic values accruing to

both Washington and the nation in insuring that massive oil spills from large supertankers do not occur in Puget Sound.

Chapter 125's tug escort requirement also does not impose an undue burden on interstate commerce. The average cost for tug escorts for tankers calling at ARCO's Cherry Point refinery has been approximately \$7,500.00, which translates into \$.116 per barrel for a tanker of 90,000 dwt and \$.0087 per barrel for a tanker of 120,000 dwt. Pretrial Or... ¶ 8. These are very minimal cost increases and are clearly proportional to the important oil spill preventative service provided by the tug escorts. See, *Evansville-Vanderburg Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972) (upholding 'enplaning' tax where the revenue derived did not exceed the cost of running the airport). Both the tanker size limit and the tug escort requirements for Puget Sound are more like the South Carolina statute in *South Carolina Hwy. Dept. v. Barnwell Bros.*, 302 U.S. 177 (1938), which prohibited the use on state highways of semi-trailer trucks wider than 90 inches or heavier, including load, than 20,000 lbs. Even though the federal trial court had found that interstate trucking had become a national industry and that a very large proportion of trucks in interstate commerce were 96 inches wide and weighed, when loaded, more than 20,000 lbs., the Supreme Court unanimously upheld the validity of the State statute against a claim that it infringed on interstate commerce:

"With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, *regulations of the use of the highways are*

akin to local regulation of rivers, harbors, piers and docks, quarantine regulation, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce." *Barnwell, supra*, 187-188. (Emphasis added.)

Chapter 125 also clearly has none of the badges or effects of economic discrimination which have invalidated state regulations which only slightly burden interstate commerce. Local tanker business or commerce is not particularly benefited by Chapter 125. Chapter 125 is plainly aimed at protecting environmental quality in Puget Sound, not at promoting local business interests at the expense of outside interests. Nor does Chapter 125 present the potential for conflicting requirements among the states such as the curved mudguards required by a state in *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). Puget Sound is not a highway or railroad traversing many states. Because the tanker size limit is rationally related to protecting the environmental integrity of Puget Sound, this regulatory limitation is conceptually no different from physical limitations that prevent supertankers from entering shallow estuaries. Each bay or estuary is unique in this respect. The optional design and safety equipment requirements in Chapter 125 could operate as potentially conflicting regulations if they were mandatory. But these requirements are optional, not mandatory. The tug escort requirement is also not the kind of local requirement held invalid in *Bibb* simply because it does not require any alterations or changes to tankers.

In summary, Chapter 125's tanker size limit and tug escort requirements do not constitute undue burdens

on interstate commerce. Chapter 125 is rationally aimed at protecting marine environmental quality in Puget Sound. The burdens and costs imposed on tanker oil transportation into Puget Sound by Chapter 125 are modest when balanced against the extraordinary dangers to public health and to Puget Sound's environment that Chapter 125 seeks to avert.

In recent years, many state and federal courts have not hesitated to sustain state legislation aimed at protecting environmental quality and natural resources against attacks based on alleged violations of the Commerce Clause. *American Can Co. v. Oregon Liquor Control Comm.*, 15 Ore. App. 618, 517 P.2d 691 (1973) [ban on non-returnable beverage containers]; *Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1974), cert. den. 421 U.S. 978 (1975) [ban on phosphate detergents]; *Portland Pipe Line Corp. v. Environmental Improvement Comm.*, 307 A.2d 1 (1973), appeal dismissed 414 U.S. 1035 (1973) [prevention and control of marine oil spillage]; *Construction Ind. Assoc. v. Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. den. 424 U.S. 934 (1976) [limitation on building below prevailing market demand]. This Court should also sustain this state environmental quality legislation.

#### Conclusion

Where, as in this case, Congress has not clearly indicated its intent, and where the federal statute does not by its terms completely cover the field, a ruling that the states are preempted will create a gap in much needed regulation of oil tanker operations, leaving the states powerless to fill it. Permitting the states to regulate in the gaps, where no actual conflicts with

federal regulation occur, still allows Congress the option of acting legislatively to preempt all state action. Permitting the states to regulate also encourages experimentation in diverse ways to solve the complex economic, social and environmental problems presented by the massive transportation and processing of oil in the coastal states. Permitting state regulation will promote federalism and will not frustrate national policies.

It is difficult to see how the concurrent exercise of federal and state powers in this case must necessarily and inevitably lead to conflicts or frustration of federal purposes. See, *Goldstein v. California*, 412 U.S. 546, 549 (1973). The problem of preventing and minimizing tanker oil spills in unique coastal marine environments will not be made more difficult by the tanker size limitation in Chapter 125. The problem will not be made more difficult by the tug escort requirement for tankers in the 40,000-125,000 dwt range. The problem will not be made more difficult by the State's setting out optional safety and design features which will hopefully encourage shipbuilders to construct better and safer tankers than the Coast Guard currently requires. It is incongruous to promote a given end on the one hand and at the same time prevent states from undertaking supplementary efforts toward the very same end. See, *New York State Department, etc. v. Dublino*, 413 U.S. 405, 419-420 (1973). Carefully analyzed, it is evident that Chapter 125's size limits and tug escort requirement are supplementary to the federal objective and present no actual conflicts with federal purposes or law. Where, as here, Congress has not indicated clearly any intent to provide an exclusive remedy to the problem of tanker oil spills,

and where coordinate state and federal efforts exist within a complementary framework, and where both have the same objectives, the case for federal pre-emption is weak. *Marshall v. Consumers Power Co.*, 237 N.W. 2d 266, 282 (1976); *New York State Dept., etc. v. Dublino*, 413 U.S. 405, 421 (1973); *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 512-513 (1949). As in *Askew v. American Waterways Operators, supra*, and as in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), this Court should uphold Chapter 125.

Dated: May 13th, 1977.

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MAY 14 1977

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-930**

DIXIE LEE RAY, ET AL.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, ET AL.,

*Appellees.*


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**BRIEF OF THE STATES OF MARYLAND,  
DELAWARE, MAINE, MINNESOTA, NEW YORK,  
RHODE ISLAND AND PROVIDENCE PLANTATIONS,  
FLORIDA, AND IDAHO AS AMICI CURIAE**


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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-930**

DIXIE LEE RAY, ET AL.,

v.

*Appellants,*

ATLANTIC RICHFIELD COMPANY, ET AL.,

*Appellees.*

**BRIEF OF THE STATES OF MARYLAND,  
DELAWARE, MAINE, MINNESOTA, NEW YORK,  
RHODE ISLAND AND PROVIDENCE PLANTATIONS,  
FLORIDA, AND IDAHO AS AMICI CURIAE**

**INTERESTS OF AMICI CURIAE**

The interests of Maryland, Delaware, Maine, Minnesota and New York are presently before this Honorable Court in their Brief In Support of Statements As To Jurisdiction; the interests of the States of Rhode Island, Florida, and Idaho are herein offered.

**STATE OF RHODE ISLAND AND  
PROVIDENCE PLANTATIONS**

The territorial waters of Rhode Island include Narragansett Bay, together with Mount Hope Bay, the Sakonnet River and portions of Block Island and Rhode Island Sounds.

The Rhode Island coastal zone is managed by the Rhode Island Coastal Resources Management Council. Created in 1971, the Council has broad powers to plan, manage and coordinate petroleum processing, transfer and storage of oil on land and on the territorial waters. Sections 46-23-6(b) and 46-23-6(B)(6), General Laws of Rhode Island, 1956, as amended.

Petroleum storage facilities presently exist in Providence, at the head of Narragansett Bay and Newport. Onshore oil support facilities have been proposed for the former naval bases at Quonset Point and Davisville, also on Narragansett Bay. Rhode Island shares the great concern for its historical legitimate role to protect and control the use of its waters.

#### STATE OF FLORIDA ex rel.

Robert L. Shevin, Attorney General

The State of Florida is endowed with 11,000 miles of saltwater shoreline. Of those, 1,435 miles are sandy beaches; 5,600 miles are mangrove and tidal marshes; and the remaining 4,000 miles are developed shoreline or nonbeach recreational shoreline. Most of the 27 million tourists who annually visit Florida utilize the shore facilities. They spend approximately \$9 billion a year. Saltwater commercial fishing in the ocean and gulf produces over \$200 million worth of fish at market value per year. Twelve and one half million man<sup>days</sup> and a total of \$500 million per year is spent on sports fishery, including equipment and charter boats, etc. There are 15 deep draft ports in Florida (27 feet or deeper). Over one million tons of freight are brought into these ports per year; one million passengers per year come into the ports.

It is the policy of the State to protect this natural environment. See Article II, Section 7, Florida Constitution; *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). The Florida legislature has enacted Chapter 376, Florida Statutes, to protect Florida's coastal and marine environment from degradation from spillage of oil and other pollutants. Subsection 376.07(f) of Chapter 376 authorized, in part, the Florida Department of Natural Resources to adopt regulations establishing "requirements for minimum weather and sea conditions for permitting a vessel to enter port . . .".

Florida has a great interest in the continued authority to protect its coastal environment through Chapter 376, Florida Statutes, and other means which it may deem necessary and proper.

#### STATE OF IDAHO

The State of Idaho joins the other Amici States to pursue the principle that a State may legislate to protect the natural resources within its boundaries. Idaho urges also that, in light of the long history of police power regulation, the subject Washington Statute was not impliedly preempted by the Ports and Waterways Safety Act.

#### OPINION BELOW

The opinion of the Three Judge District Court, United States District Court for Washington dated September 24, 1976, is set forth in the appendix of the Brief of the State of Washington filed with this Court.

#### JURISDICTION

This appeal is from a final Order entered in a suit for injunctive relief pursuant to 28 U.S.C. §2281, §2284(3). The Order for a permanent injunction was entered on November 12, 1976. Notice of appeal was filed in U.S. District Court for Washington on September 28, 1976.

Jurisdiction of this Court is evoked in accordance with provisions of 28 U.S.C. §1253, authorizing appeal from an Order of a Three Judge Court permanently enjoining enforcement of the state statute when such order gives rise to a substantial question such as one involving conflict between state and federal interests. On February 28, 1977 this Court noted probable jurisdiction based on 28 U.S.C. §1253.

The respective states identified above herewith file as amici curiae pursuant to Rule 42(4) of the Supreme Court Rules of Procedure.

### QUESTIONS PRESENTED

1. Whether the states are preempted from enacting legislation to protect their natural resources from damage caused by oil because of the Ports and Waterways Safety Act of 1972, 33 U.S.C. §1221 *et seq.* which is presently in force.
2. Whether the traditional exercise of the police power which has culminated in the passage and enactment of the Washington statute is proper as it relates to interstate and foreign commerce.

### STATEMENT

Amici adopt the Statement of Facts presented by the State of Washington.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause, Article VI, Clause 2; the Commerce Clause, Article I, Section 8, Clause 3; and the Tenth Amendment. The Statutory provisions are 33 USC §1221, §1222, 46 USC 391(a) (the Ports and Waterways Safety Act), and Revised Washington Code §88.16.170 *et seq.* (the Washington Tanker Law).

### ARGUMENT I

#### THE STATES, AS TRUSTEES, HAVE TRADITIONALLY ENACTED LAWS TO PROTECT AND PRESERVE THE COMMUNITY'S INTEREST IN NAVIGABLE WATERS.

The District Court's sweeping conclusion that the Ports and Waterways Safety Act of 1972 (PWSA), 33

U.S.C. §1221 *et seq.*, and 46 U.S.C. §391(a) preempts the provisions of Chapter 125, Laws of the State of Washington, 1975 First Extraordinary Session, codified as R.C.W. §88.16.170 *et seq.* (Chapter 125), curtails the exercise of State police powers designed to protect their territorial waters<sup>1</sup> from the danger of oil pollution from vessels.

Navigational waters have long been afforded a special status incident to citizenship. The use of territorial waters for navigation, commerce and fishing was an unrestrainable privilege held in common by all subjects of the Roman empire. See Note, "The Public Trust in Tidal Areas: A Sometime Submerged Territorial Doctrine," 79 Yale L.J. 762 (1970). This same right, the *jus publicum*, was a common right enjoyed by the subjects of the British Crown, as early as the 17th century. While the King of England was considered to hold title to lands under tidal water, his title was encumbered by a trust for the benefit of the public. Even should the King convey private grants or otherwise encumber submerged land, these conveyances remained subject to the *jus publicum*, the trust in favor of the public, for commerce and fishery. See Note, "State and Local Wetlands Regulations: The Problem of Taking Without Just Compensation," 58 Va. L. Rev. 876 (1972).

Following the American Revolution, the thirteen original States succeeded to the public trusteeship holding the subaqueous lands within their boundaries for the benefit of the citizens of the Colonies. The interests which had been protected to this date were those basic to the survival of the citizens, but as society

<sup>1</sup> State territorial waters are defined for purposes of this brief as those within the boundaries of the State including those from the shoreline of coastal states to the three-mile limit. 43 U.S.C. §1311 *et seq.* (Submerged Lands Act of 1953). See *U.S. v. Maine*, 420 U.S. 515; 43 L. Ed. 2d 363; 95 S. Ct. 1155 (1975).

became more sophisticated, the relationship between the public and water usage has also become more complex. See *Just v. Marinette County*, 56 Wisc. 2d 7, 201 N.W.2d 761 (1972).

In *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 97 S. Ct. 582 (1977), this Honorable Court reaffirmed a long line of cases, commencing with *Martin v. Waddell*, 16 Pet. 367; 10 L. Ed. 997 (1842), and extending through *Shively v. Bowlby*, 152 U.S. 1; 14 S. Ct. 548; 38 L. Ed. 331 (1894), which held that it was the State's responsibility to legislate in this area as trustee for the benefit of the public. This is a right carried out by the States completely, so long as the State enactments do not interfere with the navigation easements surrendered to the Federal Government. The method by which the States legislate in this field becomes more intricate as the competing interests for the use of the waters intensify; however, the ramifications of this type of legislation are basically of a local nature. Given the long history associated with the stewardship of navigable waters by the States, and the exercise of the police power so basic to both the proprietary and regulatory interests of the states, the preemption of this authority arises only when an unequivocal intent to occupy this field is displayed in the federal legislation.

While the ownership theory has eroded over the years, it still is a source of a state's regulatory power over the natural resources within its boundaries. In the *State of Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1061, 1066, 1067 (D.C. Md. 1972), an oil spill liability case, the District Court succinctly summarized the state authority flowing from "ownership" of navigable waters:

The whole ownership theory, in fact is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the

exploitation of an important resource. A state may care for its own in utilizing the bounties of nature within her borders because it has *technical ownership* of such bounties or, when ownership is in no one, because the state may for the common good exercise all the authority that technical ownership ordinarily confers. (Emphasis supplied) *Toomer v. Witsell*, 334 U.S. 385, 402, 408 (1948), rehearing denied, 335 U.S. 837 (1948).

This Court and the lower Courts have recognized the serious consequences of oil pollution which State laws such as Chapter 125 seek to avoid.

Oil pollution of the nation's navigable waters by seagoing vessels both foreign and domestic is a serious, and growing problem. The cost to the public, both directly in terms of damage to the water and indirectly of abatement is considerable. *California, Department of Fish and Game v. S.S. Bournemouth*, 307 F. Supp. 922, 929 (C.D. Cal. 1969).

The State's role in legislating in this area has been recognized in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). In that case, this Honorable Court determined that the State of Florida could enact a statute imposing strict liability upon foreign vessels for damages sustained by the State of Florida or its citizens as a result of oil pollution. It was determined that Florida's law could be construed harmoniously with the Federal Water Quality Improvement Act, 33 U.S.C. 1161 et seq. Perils of oil pollution were specifically addressed. It was noted that public beaches could be ruined by oil spills, that shellfish beds could be destroyed and the livelihood of fishermen endangered. *Askew, supra* at 332-33.<sup>2</sup>

<sup>2</sup> For a recent study of the increased toxic effects of spilled number 2 fuel oil after exposure to sunlight see article by Dr. Richard A. Larson, Laura L. Hunt and David W. Blankenship, to be published in *Environmental Science and Technology*, 1977. After being exposed to sunlight, hydrocarbon

This case law, as well as recent Congressional legislation discussed below, evidences a scheme of federal-state cooperation which preserves the state's role. Indeed, the constitutional grants of federal authority over interstate commerce, naval facilities, (Art. I, §8) and judicial jurisdiction over admiralty and maritime cases, (Art. III, §2) contain no hint that the States intended to surrender their public trust duties over territorial waters to the federal government.

## ARGUMENT II.

### THE PORTS AND WATERWAYS SAFETY ACT OF 1972 DOES NOT PREEMPT THE STATES FROM EXERCISING THEIR POLICE POWERS TO PREVENT OIL POLLUTION OF THE TERRITORIAL WATERS.

Legislation enacted to protect states' natural resources are not deemed preempted by federal enactment, unless the "nature of the [federally] regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1962), citing *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1950); *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). compounds in number 2 fuel oil are transformed into toxic peroxides, phenols and acids, all compounds that dissolve easily in water and are toxic to marine life.

Effects of oil spills in estuaries are characterized by Donald F. Boesch, Carl H. Hershner and Jerome H. Milgram, *Oil Spills and the Marine Environment* (Cambridge, Mass., 1974) at page 25.

"Several characteristics of estuaries suggest that oil pollution may have serious effects there. Because estuaries are generally confined and relatively shallow bodies of water, oil spills may not spread over a large area of the water's surface and have little chance to be swept out to sea. Instead, there is a high likelihood that the oil will reach shore or the bottom. Estuaries are typically turbid, and therefore floating oil may tend to absorb onto fine sediment particles and sink to the bottom, where it may kill or contaminate bottom-dwelling organisms, including shellfish and bottom feeding fishes."

### A. THERE IS NO CLEAR AND MANIFEST CONGRESSIONAL EXPRESSION OF PREEMPTION IN THE PWSA.

Title I of the PWSA, 33 U.S.C. §1221(b) and (c), provides that States are not preempted from prescribing "higher safety equipment requirements or safety standards" relative to "structures". The District Court impliedly agreed that the Federal Act did not expressly preempt State laws adopting safety standards regulating operation of oil tankers when the sole purpose is to safeguard their waters, their shellfish and floating fish and their recreational marine environments from oil pollution.

The District Court determination that the PWSA preempts Chapter 125 because it establishes a "comprehensive federal scheme" is contrary to the principles of implied preemption set down by this Court upholding local regulations related to health, safety and pollution control. See *Huron Portland Cement Co. v. Detroit*, *supra*.

Whether a comprehensive scheme is presented in the federal legislation is but one factor to be considered in order to show the Congressional intent to preempt. Did, in fact, Congress so forcibly occupy the present field of regulation that they intended to shove aside the states' traditional efforts with respect to protection of their natural resources? Was the need for uniformity so great that Congress had no alternative but to intentionally preempt this area?

In *Bethlehem Steel v. N.Y. State Labor Relations Board*, 330 U.S. 767, 780 (1947), Mr. Justice Frankfurter stated:

. . . Since Congress can, if it chooses, entirely displace the states to the full extent of the far-reaching commerce clause, Congress needs no help from generous judicial implications to achieve the

supersession of state authority. To construe federal legislation so as not needlessly to forbid pre-existing state authority is to respect our federal system. *Any indulgence in construction should be in favor of the states*, because Congress can speak for itself with drastic clarity whenever it chooses to assume full federal authority completely displacing the states. (emphasis added)

In *Reid v. Colorado*, 187 U.S. 137, 148 (1902), Justice Harlan stated:

It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This Court has said — and the principle has been often reaffirmed — that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnott v. Davenport*, 22 How. 227, 243; 16 L. Ed. 243, 247 (1859).

When dealing with the "the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties", this Court's analysis is "tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, Pierce, Fenner and Smith, Inc v. Ware*, 414 U.S. 117, 127 (1973) citing *Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 357 (1963); *Decanas v. Bica*, *supra*, at 357.

The reconciliation of federal and state laws affecting maritime activities has ample precedent. In *Kelly v. Washington*, 302 U.S. 1 (1937) this Court sustained the coexistence of local inspection laws for motor driven tugs engaged in interstate and foreign commerce, and federal certification statutes which included inspection

provisions. The overriding state interests sought to be protected in *Kelly v. Washington*, *supra*, are strikingly similar to those in the instant case.

"When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the state is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the state of the power which it would otherwise possess." *Id.* at 14.

In the 1960 case of *Huron Portland Cement Co. v. Detroit*, *supra*, a municipal air pollution law applied to vessels engaged in interstate commerce was sustained as compatible with federal safety inspection laws, even though the vessels required structural changes to comply with the Detroit ordinance. As recently as 1973, in *Askev v. American Waterways Operators, Inc.*, *supra*, a Florida oil spill liability law was reconciled with the comprehensive federal oil spill liability provisions of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1251 *et seq.*).<sup>3</sup>

In the instant case, the provisions of Chapter 125 are intended to impose the minimum standards considered necessary to prevent oil spills in Puget Sound, §88.16.170 of Chapter 125.<sup>4</sup> The provisions of Chapter

<sup>3</sup> *Askev v. American Waterways Operators, Inc.*, *supra*, was decided less than one month prior to *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). This Court distinguished State regulation of airlines from state regulation of vessels even when environmental protection is the manifested purpose.

<sup>4</sup> Compliance with Chapter 125 requirements has the carryover effect for other port areas of assuring that tankers will not become unsafe, unseaworthy or a source of pollution.

125 should be considered as the local safety standards for oil tankers entering Puget Sound, contemplated as part of the national scheme by the authors of the PWSA. 33 U.S.C. §1221(c), (e) (3). Each port in the United States must and ultimately will implement its own safety standards. This will occur whether it be by state or federal fiat.

**B. THE SUBJECT MATTER BEING REGULATED,  
DUE TO THE VAGARIES OF EACH LOCALITY,  
DOES NOT DEMAND UNIFORMITY VITAL TO  
NATIONAL INTERESTS.**

The issue of uniformity was raised in *Cooley v. Board of Wardens of Port of Phila.*, 53 U.S. 299 (1851), in which a local law required all vessels arriving from or bound to any foreign port, and every vessel over 75 tons sailing to any port in the Delaware River, to receive a local pilot. The question of preemption turned, in part, upon the alleged need for uniformity of pilot regulations. This Court stated:

"... the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants." *Cooley v. Board of Wardens of Port of Philadelphia, supra* at 320.

See also *Florida Lime & Avocado Growers, Inc., supra*, at 143-44. The safeguards provided by Chapter 125 i.e., tug escorts, prohibition of supertankers, are consistent with the theme of local regulation expressed in *Cooley v. Board of Wardens of Port of Philadelphia, supra*. National uniformity is neither contemplated nor realistic. Where the physical risks of groundings are high and/or the productivity of the waters is of significant environmental and economic importance, it is the State which should determine if and under what

conditions an oil tanker may enter confined state waters. The decision has a direct impact on the heart of the state's economic interests. To deprive the states of this authority, given the equivocal language of the federal statute, is to strip the states of a significant attribute of their sovereignty.

For example, the State of Maine in 1970 adopted its Site Location and Development Act, 38 M.R.S. §481 *et seq.*, empowering the Board of Environmental Protection to approve location of, *inter alia*, major industrial developments in the State. Pursuant to this law, the Board disapproved a proposed oil refinery at Searsport, Maine, (decision was sustained by the Supreme Judicial Court of Maine, *In Re Maine Clean Fuels, Inc.*, 310 A.2d 736 (Me. 1973)) and approved, subject to numerous conditions, an oil refinery at Eastport, Maine.

The Board rendered specific findings and imposed conditions relative to the movement of vessels carrying crude oil, the particular route, the type of vessels, and the assistance necessary through pilotage, aids to navigation, and necessary equipment. The conditions imposed by the Board, which also included provision for double bottoms and segregated ballast, clearly demonstrate the particularized interest Maine has in protecting its waters and shores from oil pollution. At the same time, they reflect a State determination of the balancing necessary to protect these resources and accommodate economic growth.

**C. THERE IS NO DIRECT CONFLICT BETWEEN  
THE PORTS AND WATERWAYS SAFETY ACT  
AND CHAPTER 125 OF THE LAWS OF  
WASHINGTON.**

In the instant case, the District Court did not find irreconcilable conflicts between the provisions of the Ports and Waterways Safety Act (PWSA), 33 U.S.C. §1221 *et seq.*; 46 U.S.C. §391(a), and Chapter 125. This

case does not present a conflict between Federal and State enactments, even under the District Court's determinations, for that decision was a pure preemption decision. The Court inferred an intent to preempt from the "comprehensive federal scheme". *See Kelly v. Washington, supra.*

Oil tankers can comply with the provisions of both the PWSA and Chapter 125. A factual analysis of the two acts demonstrates that, if tankers are without the preferred design and equipment (§88.16.190 of Chapter 125), then tug escorts provide the reasonable alternative. There are no comparable tug escort provisions within the PWSA or in current federal regulation.<sup>5</sup> Likewise, oil tankers over 125,000 dead weight tons (DWT) which by §88.16.190 of Chapter 125 are prohibited from entering Puget Sound, may continue off-loading their cargoes into smaller tankers or use the proposed Port Angeles or other deep water ports contemplated by the Deepwater Port Act of 1974, 33 U.S.C. §1501 *et seq.* The PWSA does not preclude such alternatives. The PWSA, §1221(5) expressly authorizes State pilots on self-propelled vessels engaged in the foreign trades. Thus it is possible to comply concurrently with both federal and state enactments. The adoption of a comprehensive scheme is not determinative, by itself, of a federal intent to preempt. Assuming, *arguendo*, that the District Court is accurate in its findings that "a comprehensive federal scheme" is envisioned by the PWSA, it does not follow that all state laws on the subject matter are automatically

<sup>5</sup> The Coast Guard on May 6, 1976 published advanced notice of proposed minimum standards for tug escort in confined waters. While actual regulations have never been offered, the advance notice recognizes that tug assistance in confined waters is intended to reduce the potential for collisions, rammings, and groundings in these areas. Inherently, the tug requirement will differ for each waterway. 41 Fed. Reg. 18770 (May 6, 1976).

preempted. Where "Congress has outlined its policy in general and inclusive terms and delegated determination of their specific application to an administrative tribunal," State legislation occupying the same field encompassed by the federal law may also be upheld in the *interim*, pending the adoption by federal authorities of the comprehensive protective rules and regulations required to carry out the federal scheme. *Bethlehem Steel Co. v. New York Labor Relations Board, supra*, at 773, 774; *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714, 723-724 (1963); *Northwestern Bell Telephone Co. v. Nebraska State Commission*, 297 U.S. 471 (1936); *Welch Co. v. New Hampshire*, 306 U.S. 79 (1939). This test is applicable to the case at bar.

The tug-escort provision of Chapter 125, §88.16.190, is a basic alternative to greater tanker safety design and equipment features required elsewhere within that provision. The District Court, referencing 33 U.S.C.A. §1221(3)(iv), concluded that the PWSA preempts the tug-escort provisions of Chapter 125, even though it does not directly refer to tug-escort. While it may be argued that tug-escort is authorized under that Section, the Coast Guard is only in the preliminary stage of promulgating minimum standards for tug assistance in confined waters. 41 Fed. Reg. 18770 (May 6, 1976). Until the Coast Guard standards are promulgated, Washington's tug-escort provisions should fill the gap in order to reduce the chances of oil spills in Puget Sound.

The adoption of federal regulations does not in and of itself void "interim" state regulation for it is abundantly clear from the record that federal regulations to date are not effective in preventing oil pollution from tankers. In *Bethlehem Steel, supra*, this Court held that it is only "when the comprehensive [federal] regulations effectively governing the subject matter of the statute

. . ." have been adopted that state regulation is invalid. *Napier v. Atlantic Coastline R. Co.*, 272 U.S. 581 (1928) (Emphasis added)

In 1975, the M/T EDGAR QUEENY collided with the M/T CORINTHOS off Marcus Hook, Pennsylvania, resulting in discharges of approximately 13 million gallons of crude oil. In 1976, there was a rash of serious oil tanker spills. On October 29, 1976, the tanker RICHARD C. SAUER discharged 75,000 gallons of its cargo of 9,240,000 gallons of light crude oil. On December 15, 1976, the now famous ARGO MERCHANT ran aground and broke apart off Nantucket, Massachusetts, spilling 7.5 million gallons of number 6 oil. On December 27, 1976, the tanker OLYMPIC GAMES ran aground spilling 134,000 gallons of crude oil into the Delaware River near Marcus Hook, Pennsylvania. The oil tanker tragedies have continued on into 1977. On January 4, 1977 the tanker GRAND ZENITH broke up, discharging approximately 8 million gallons of number 6 oil south of Nova Scotia. Significantly, in 1977 there have been several "close calls". On January 5, 1977, the tanker UNIVERSE LEADER grounded in the Delaware River, Pennsylvania. No leakage occurred, but the potential discharge was 21,000,000 gallons of crude oil. On January 11, 1977 the vessel AMOCO INDIANA ran aground in Grand Traverse Bay, Great Lakes. No leakage occurred, but the vessel had a cargo of 2,310,000 gallons of number 2 diesel fuel. On January 13, 1977, the tanker HARMONIC grounded in Gravesend Bay, New York, and, while losing only a negligible amount of oil, had a cargo of 27 million gallons of light crude oil. On January 25, 1977, the tanker OVERSEAS ALICE grounded near Baltimore, Maryland. Again no spill occurred but the potential was 5,880,000 gallons of gasoline. See "Oil Spills, And Spills of Hazardous Substances", Oil and Special Materials Control Div.

ision Office of Water Programs Operations, U.S. Environmental Protection Agency, March, 1977.<sup>6</sup> Until effective federal regulation has been adopted incorporating the provisions of Chapter 125, the state law must stand as a means of protecting valuable natural resources.

Section 88.16.180 of Chapter 125 requires any oil tanker whether enrolled or registered, of 50 thousand DWT or greater to take a Washington State licensed pilot while navigating in Puget Sound and adjacent waters. The District Court, citing 46 U.S.C. §215 and §374, found that states may require state licensed pilots for "registered" vessels (those entitled to engage in international trade, 46 U.S.C. §11), but may not require such pilots for enrolled vessels engaged in coastwise trade. It does not necessarily follow, however, that all of the provisions of Chapter 125 relating to state licensed pilots are preempted.

The State of Delaware still recognizes the need for local knowledge and experience of pilots for vessels traveling to or from ports in the Delaware River or Bay. Title 23, Section 117 of the Delaware Code requires a State pilot for such vessels. A Delaware license for piloting vessels drawing over 27 feet of water is not granted to any person unless he/she has served an apprenticeship of at least four years to a licensed pilot and, under the inspection of his/her master or pilot,

<sup>6</sup> Also listed in the EPA publication are actual and potential oil discharges from barges. On January 9, 1977, 80,000 gallons of number 2 diesel oil was spilled in Tampa Bay, Florida. In January 1977, a barge grounded in the Chesapeake Bay which could have discharged 608,000 gallons of number 6 oil. Again, a potential discharge of 840,000 gallons occurred on the Potomac River on January 17, 1977. On January 24, 1977 the Chesapeake Bay nearly suffered a 276,000 gallon and 138,000 gallon discharge of number 2 oil and kerosene respectively. On January 28, 1977, 100,000 gallons of heating oil were discharged into Buzzards Bay near Massachusetts.

conducted a vessel for at least 96 trips up or down the Delaware River and Bay. 23 Del. Code, Section 112, 113, 114.

In the instant case, the District Court concluded that the PWSA establishes a comprehensive federal scheme for regulating, *inter alia*, pilotage of tankers. (See Appendix to the Brief of the State of Washington.) In fact, the PWSA expressly acknowledges and reserves to the State regulatory authority over pilots. 33 U.S.C. §1221 (5) provides:

... The Secretary of the department in which the Coast Guard is operating may

\* \* \* \* \*

(5) require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances *where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved.* (Emphasis supplied)

The Revised Code of Washington, §88.16.190, requires all applicants for a State pilots license to obtain, as a prerequisite, a first-class federal license to pilot on Puget Sound and adjacent inland waters. Thus, in most instances, the federal and state pilots will be one and the same, leaving the conflict between the statutes, as applied, more illusory than real. Even if the State requirement relative to "coastwise vessels" is considered preempted, the remaining segment of that provision must be determined as enforceable and valid for Congress in the PWSA has specifically authorized state pilots for "registered vessels." 33 U.S.C. §1221(5).

#### D. THE RECENT SCHEME OF FEDERAL LEGISLATION RECOGNIZES THE STATES' EXERCISE OF POLICE POWER TO CONSERVE AND PROTECT THEIR NATURAL RESOURCES.

The Federal Water Pollution Control Act Amendments of 1972, codified as 33 U.S.C.A. §1251 *et seq.*, the subject of the dispute in *Askew v. American Waterways Operators, Inc.*, *supra*, invites the states to impose "any requirement or liability with respect to the prevention of a discharge of oil or hazardous substance into any waters within such state." 33 U.S.C. §1321(O)(2). Chapter 125 provides those "requirements" by authorizing a group of alternatives, i.e., the design standards, the tug escort provisions and the prohibition of supertankers, all considered necessary to prevent the discharge of oil pollutants into Puget Sound.

The Coastal Zone Management Act of 1972, 16 U.S.C.A. §1451 *et seq.*, recognizes the various stresses and impacts on coastal estuarine areas, stating *inter alia*:

(c) The increasing and competing demands upon the lands *and waters* of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, . . . extraction of mineral resources and fossil fuels, *transportation and navigation*, . . . harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion. (Emphasis added)

And in subsection (h), Congress declares:

*The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the States to exercise their full authority over the lands and waters of the coastal zone by assisting the states. . . . (emphasis added)*

In §1452, Congress underlines the states lead role, calling for support for the states' programs which should be designed to sustain the traditional uses of the zone.

(b) to encourage and assist the States to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historical and aesthetic values as well as needs for economic development.

Section 1453 defines "coastal zone" to include "coastal waters" including those waters adjacent to shorelines, containing a measurable quantity or percentage of sea water, including but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries. Both Puget Sound and the Chesapeake Bay are prime examples of coastal waters which must be protected from adverse effects associated with transportation, navigation and the shipment of oil thereon. Under the present scheme of state and county laws, local communities could utilize their zoning powers to redefine and proscribe uses for the various areas of the zone within the state. Such actions, for instance, could prohibit port uses in certain localities. The retention and exercise of this local zoning authority evidences the diverse influences on coastal zone areas, belying the claimed need for federal uniformity.

As anticipated by the federal statute, Maryland, in 1975, enacted a Coastal Facilities Review Act, codified as §6-501 *et seq.*, Natural Resources Article, Annotated Code of Maryland (1974 Vol., as amended), to formally implement a State coastal zone management plan pursuant to the Federal Coastal Zone Management Act of 1972. The State Act recognizes that the coastal area bordering on the Atlantic Ocean and the Chesapeake Bay is productive yet ecologically fragile. The fish, shellfish, and other living marine resources and wildlife

are declared to be a unique, irreplaceable, natural and esthetic resource of great economic value. The Act recognizes that oil transported into or through Maryland by tanker or pipeline will generate new competing demands upon the waters of the State, and that it is in the interests of both the State and nation to require a method of resolving these demands, "which will give a high priority to the natural systems of the coastal zone and promote the public health, safety and welfare." Natural Resources Article §6-502(b) Annotated Code of Maryland (1974 Vol., as amended). The Act is replete with references to the need to strike a reasonable balance between national energy needs and coastal resources protection. State permits are required prior to the construction of port or harbor facilities for the handling of oil tanker cargoes. Inherent in the coastal facilities review process is the designation within the State of certain waters for conveyance of oil laden tankers and the exclusion of such tankers in other unsuitable waters. Natural Resources Article §6-508 Annotated Code of Maryland (1974 Vol. as amended). State regulations are being adopted setting forth extensive criteria for the evaluation of the impact of any proposed oil facility in the coastal zone. The District Court's decision in the instant case questions, contrary to express Congressional intent, the legitimate role of any State in planning for the coastal zone.

The Deepwater Port Act of 1974, 33 U.S.C. §1501 *et seq.*, conditions issuance of a license for a deep water port upon the approval of the issuance by the Governor of the adjacent coastal state, §1503(c)(9), and the reasonable progress by that adjacent coastal state of an approved coastal zone management program pursuant to the Coastal Zone Management Act of 1972, §1503(c)(10). Congress has thereby expressly provided for continued state authority, in the form of an absolute veto, to control the uses of its waters including the

construction of deep water ports into which the oil tankers in excess of 125,000 DWT are to off-load their cargoes.

As anticipated by the federal enactment, the Maryland Legislature has this term enacted State legislation authorizing State participation pursuant to the Federal Statute.

When the provisions pertaining to protection of the marine environment of the Ports and Waterways Safety Act of 1972 are reviewed with the background of the above-referenced federal acts, a federal scheme providing for state power to regulate activities within its waters emerges. It is within this framework that Chapter 125 and all other similar State legislation must be reviewed.

### ARGUMENT III.

#### CHAPTER 125 IS A PROPER EXERCISE OF WASHINGTON STATE'S POLICE POWER.

The protection of exhaustible natural resources is a valid exercise of a state's police powers. *See Corsa v. Tawes*, 149 F. Supp. 771 (D. Md. 1957); *Marks v. Whitney*, 6 Ca. 3d 251, 491 P.2d 374 (1971), *see also Maryland Dept. of Nat. Res. v. Amerada Hess Corp.*, 350 F. Supp. 1066 (D. Md. 1972). The extent to which these powers may be utilized vary according to the scope of regulation and the subject matter which is to be protected. In *Berman v. Parker*, 348 U.S. 26, 32 (1954), this court characterized the police powers in the following manner:

We deal in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. \* \* \* Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In

such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. \* \* \* The role of the judiciary in determining whether that power is being exercised for a public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. *Id.* at 32.

*See also Lawton v. Steele*, 152 U.S. 133, 136, 137 (1894).

A "material" interference with maritime commerce by an exercise of the police powers is acceptable when protecting areas of local concern, including rivers, harbors, piers, docks, quarantine regulations, and game laws. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 187 (1938); *Huron Portland Cement Co. v. Detroit*, *supra*. Local safety measures for these areas are presumed to be valid. *Bibb v. Navajo Freight Lines, Inc.*, *supra*, at 524.

Chapter 125 is designed to prevent sea-to-shore oil pollution in Puget Sound. This Court since 1851 has continuously sanctioned a progression of state actions seeking to protect local natural resources, even though they affected maritime activities and interstate and foreign commerce. *Bob-lo Excursion Co. Michigan*, 333 U.S. 28, 37, 38 (1948). Significant examples include *Cooley v. Bd. of Port Wardens of the Port of Phila.*, *supra*, in 1851, (state pilots for vessels in state waters); *Kelly v. Washington*, *supra*, in 1937 (local inspection of motor-driven tugs engaged in interstate commerce); *Huron Portland Cement Co. v. Detroit*, *supra*, in 1960 (application of municipal air pollution standards to vessels engaged in interstate and foreign commerce); and *Askew v. American Waterways Operators, Inc.*, *supra*, in 1973 (sanctioning state regulations of "any requirement or liability" to prevent and mitigate the

damages resulting from "insidious" oil pollution). State regulations requiring local pilots for local waters, employment of safety design and equipment for oil tankers, or alternatively, utilization of tug escorts, and the prohibition of oil tankers over 125,000 DWT from entering Puget Sound (or any other body of water within a State), are necessary to accomplish the desired result, i.e., reduce the hazard of an oil spill in Puget Sound.

This Court should honor the presumption that the State legislature has passed a constitutional statute in regulating certain activities. The Honorable Chief Justice observed in a recent obscenity case, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1974):

" . . . It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional cases where that legislation plainly impinges upon rights protected by the Constitution." 413 U.S. at 60.

Illustrating this principle, the Chief Justice stated:

" . . . when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area." See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417-420, 91 S. Ct. 814, 824-826 (1971). *Id.* at 62.

It is not necessary that the subject legislation be the best or only method to accomplish the given end. It is necessary only that the legislation manifests a tendency to at least cure the contemplated evil. *North Dakota Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156 (1973). Today while proposed changes to our natural environment are received with increased scrutiny, while the pressures of a more mobile, energy intensive society intensify the attack on the environ-

ment, the risks associated with energy transportation increase. The states have attempted to take the initiative in preserving and safeguarding our natural heritage for future generations. This is only proper since the effects of maritime pollution directly impact their citizens. This is what the police power has traditionally accomplished. If indeed this action approaches a "burden" on the maritime, interstate and foreign commerce scheme, then under the concept of an expanding police power to protect our invaluable natural resources, this "burden" is justifiable. *Great Atlantic & Pacific Tea Co. Inc. v. Cottrell*, 424 U.S. 366, 375 (1976).

The "burdens" alleged to be imposed as a result of Chapter 125 are minimal. For the most part, they translate to an allegation of increased costs, which do not sustain a constitutional challenge to Chapter 125. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424 (1952); *Breard v. Alexandria*, 341 U.S. 622, 638 (1951).

For instance, with regard to the design requirements of Chapter 125, the cost of double bottoms as testified to during congressional hearings on the Ports and Waterways Safety Act of 1972 is a:

. . . minuscule factor in terms of petroleum cost because of the tiny proportion of total petroleum cost that is represented by tanker transport. The economic feasibility of double bottom construction is further highlighted by the fact that one company, Mobil Oil Corporation, has contracted for double bottom construction of its tankers on solely economic grounds. Further, double bottoms are already used on many Great Lakes ships, on vessels on the inland waterways, and on general cargo ships. 2 U.S.C., Congressional and Administrative News 1972 at 2778.

The design and safety requirements of Chapter 125 are not beyond what is plainly essential to safety and

seaworthiness.<sup>7</sup> The maximum ahead horsepower currently applied for general use in the United States (set forth in paragraph 112 of the Pretrial Order) is the equivalent of .21 hp per DWT for a 120,000 DWT vessel, and .17 hp per DWT for a 145,000 DWT vessel. These figures were summed up in the Legislative History, to wit:

In terms of maneuverability the 30,000 horsepower propulsion unit currently being installed in supertankers of 250,000 tons is the equivalent to a one-third horsepower motor on a 40-foot boat. 2 U.S.C. Congressional and Administrative News 1972, at 2778.

Once a tanker gets underway, momentum builds, and reversing that process to stop the vessel is a formidable task. A 125,000 DWT vessel utilizes approximately 3,000 feet to stop at 6 knots and 13,000 feet at 16 knots. (Paragraph 112 of the Pretrial Order). This inability to control large oil tankers in Puget Sound or in the Chesapeake Bay could result in groundings and collisions, both capable of producing the destruction wrought by episodic oil discharges.

The same type of cost analysis applies to the provisions of Chapter 125, §88.19.190(1). What are the actual increased costs? According to ARCO and Seatrain, this prohibition will require employment of more people and the operation of additional, smaller oil tankers. This argument assumes, however, that a deepwater port, as contemplated by the Deepwater Ports Act of 1974, will not be utilized. Secondly, this allegation assumes also that large tankers will trans-

<sup>7</sup> The National Governor's Conference, Winter Session, March 1, 1977, has resolved that double bottoms, multiple radar, segregated ballast are necessary for adequate protection of their waters from oil tanker pollution. See also pending federal legislation, S.182, S.568, 95th Congress, 1st Session, amending the PWSA where the Coast Guard is instructed to require double bottoms, multiple radar.

port Alaskan oil to Puget Sound, thereby affecting a cost savings on each barrel.

In order for the larger tankers to be competitive, they are being federally subsidized pursuant to the construction-differential and the operational-differential subsidies of the Merchant Marine Act of 1970, 46 U.S.C.A. §1151. This applies to new and refitted vessels. Subsidized vessels are exclusively restricted to use in foreign trade and may not operate in coastwise domestic trade unless a certain percentage of the subsidy is repaid. 46 U.S.C.A. §1156; 46 U.S.C.A. §1175. The repayment of the subsidies would substantially decrease the cost benefits of the use of tankers over 125,000 DWT.

All of ARCO's vessels which it currently operates and intends to use in the Alaska-West Coast trade are less than 125,000 DWT (Paragraphs 24, 139 of Pretrial Order). Two vessels of 150,000 DWT which ARCO claims an intention to use in coastwise trade are not yet in service. (Paragraph 24 of Pretrial Order). It is not clear from the Pretrial Order whether these two vessels are being subsidized, but if so, they too may not be used in coastwise trade unless the subsidies are partially repaid. Three other vessels under contract, two of which are 150,000 DWT and the third which is 120,000 DWT, are not eligible for coastwise trade. (Paragraph 34 of Pretrial Order)

Of the twelve vessels currently operated by Seatrain, four are over 125,000 DWT, and all four are chartered, foreign flag vessels which are prohibited from the Alaska-West Coast trade. (Paragraph 32 Pretrial Order) The four vessels over 125,000 DWT being built at the Brooklyn Navy Yard are subsidized and ineligible for coastwise trade. (Paragraph 137 Pretrial Order) This includes the T.T. STUYVESANT and the T.T. BAY RIDGE (Paragraph 38 Pretrial Order).

In addition, as of December 1975, there was over 100 million DWT of surplus capacity in the world oil tanker fleet. (Paragraph 52 of Pretrial Order). The costs of maintaining a "moth-balled" oil tanker fleet of 100 million DWT (presumably composed largely of older vessels under 125,000 DWT) further weakens ARCO's and Seatrain's argument that the Washington prohibition increases operational costs and thereby places an undue burden on interstate and foreign commerce.

The prohibition provision of Chapter 125 §88.16.190(1) excludes supertankers only from Puget Sound and adjacent waters whose unique ecological system was thought worthy of special treatment by the legislature. These vessels may ply all other water areas within the state. To hold that states cannot for good reason prioritize their natural resources by conferring special treatment, is to deprive the states of their powers to safeguard that resource from destruction.

Prohibitions against unrestricted movement in interstate commerce of "dangerous article or cargoes" which threaten life and property, are not unique to the legislation in question. States may prohibit or restrict movement of "dangerous articles or cargoes" over or through certain avenues used for interstate commerce such as underwater tunnels, because of the overwhelming risks created by the transport, *People v. Transamerican Freight Lines, Inc.*, 320 N.Y.S.2d 257, 259 (1969). Legislation has been enacted in various states restricting and prohibiting the transport of "dangerous articles or cargoes" such as explosives, flammable liquids and solids, combustible liquids, oxidizing materials, corrosive liquids, compressed gasses, and poisonous articles, through specific tunnels and over specific bridges. Article 89B, §120C, Annotated Code of Maryland (1969 Repl. Vol.)<sup>8</sup> Vehicles with such cargoes must travel by

<sup>8</sup> Maryland law prohibits the transport of Class A explosives through the Baltimore Harbor Tunnel, Susque-

alternate routes. Transportation of other dangerous articles through such tunnels and all explosives passing over certain bridges must be accompanied by vehicle escort. These requirements are analogous to the provisions of Chapter 125. Supertankers entering Puget Sound may off-load into smaller tankers or utilize deepwater ports in Washington waters. Smaller tankers may enter Puget Sound accompanied by tug escorts.

ARCO's and Seatrain's challenge to the tug escort provision of Chapter 125 §88.16.190(2) also boils down to that of increased costs. Yet tug escort is "cheap insurance" for tanker owners. The cost of one large spill which may be averted by a tug escort (or proper design or safety features, for that matter) substantially exceeds the money which may be saved. The cost of cleanup of a 135,000 gallon oil spill in Baltimore Harbor during August of 1975 was in excess of \$420,000. Costs of cleanup are over and above costs due to the loss of resources.

Thus the requirements imposed by Chapter 125 do not in the aggregate amount to an unconstitutional "burden". The subject Washington statute is mandated by the unique physical characteristics and environmental needs of the local waters. It is not discriminatory, frivolous or excessive, but serves to protect, hopefully, Puget Sound (and other water bodies) from the perils of oil spills.

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hanna River Toll Bridge, Potomac River Toll Bridge and Chesapeake Bay Toll Bridge except as provided by rules of the State Roads Commission. Vehicle escort analogous to tug escort in the instant case, is a common regulatory requirement. See also, Title 14, Ch. 85 §2B, Annotated Laws of Massachusetts; Title 75 §240 *et seq.* Pennsylvania Statutes Annotated; Article 38 §1630(2), 1642(21); New York Consolidated Laws Service, Annotated Laws of New York (1976 Vol); Title 31, Ch. 23, §37 of General Laws of Rhode Island (1956, As Amended).

## CONCLUSION

The Washington State Legislature has enacted Chapter 125, the sole purpose of which is to guard against and reduce the risks of oil spills. The Legislature made a value judgment based upon the facts at hand; increased tanker traffic, increased handling and, accordingly, an increased threat of oil spills. They determined that the need to provide added protection for Puget Sound outweighed an anticipated loss of revenue the Port would suffer through reduction of tanker traffic. Each alternative carries with it major economic and environmental implications, but the choice was made at the point of impact, at the state level. That choice was an outgrowth of Washington's traditional obligations as trustees of the state's waters for the benefit of their citizens.

Against this background of state action, the District Court determined that the Port and Waterways Safety Act of 1972 implicitly preempted Washington's initiative, even though this federal act has not been fully implemented. When weighing the equivocal language of the federal legislation against the primary role of the

state, both under its police power and the responsibilities conveyed to the states by recent federal legislation, the intent to preempt should not be a matter of inference or implication.

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In The

# Supreme Court of the United States

October Term, 1976

No. 76-930

DIXY LEE RAY, GOVERNOR OF THE  
STATE OF WASHINGTON, ET AL.,

*Appellants,*

v.

ATLANTIC RICHFIELD CO., ET AL.,

*Appellees.*

On Appeal from the United States District Court for the  
Western District of Washington

BRIEF FOR THE COMMONWEALTH OF VIRGINIA,  
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In The

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On Appeal from the United States District Court for the  
Western District of Washington

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BRIEF FOR THE COMMONWEALTH OF VIRGINIA,  
AS AMICUS CURIAE

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### INTEREST OF THE AMICUS CURIAE

The State of Virginia is vitally concerned with the protection of the Chesapeake Bay, a body of water similar to Puget Sound in many respects. Both are fragile marine ecosystems representing a precious State resource. Both possess commercial, esthetic, recreational, and scientific values that are of incalculable benefit to the State's citizens. Both are extremely vulnerable to the disastrous effects of oil tanker spills. Increasingly, carriers of petroleum products

are transporting fuel oil, crude oil and LPG through the Chesapeake Bay in ever-expanding larger tankers. In view of such an interest, the Commonwealth of Virginia emphasizes the need for local regulations expressly tailored to protect State resources.

#### QUESTIONS PRESENTED

- I. Whether a state statute exercising the historically recognized police power over inland waters is preempted by federal statutes which are both consistent with and promotive of state regulation?
- II. Whether a state statute which is designed to safeguard a vital natural resource, and which minimally burdens interstate and foreign commerce, violates the Commerce Clause?
- III. Whether a state statute which neither conflicts with any foreign treaty nor has any direct impact on foreign relations interferes with the federal power to make treaties and conduct foreign affairs?

#### SUMMARY OF ARGUMENT

I. At stake in this case is an historic state police power. Ever since *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851), the right of a state to regulate vessel traffic on its internal waters has enjoyed constitutional sanction; and Washington's Tanker Law is precisely this type of regulation. Whenever such police powers are threatened by a preemption challenge, this Court will find preemptive intent only in response to an "unambiguous congressional mandate," and preemptive conflict only where compliance with both state and federal law is a "physical impossibility."

*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S.

132 (1963). In the search for congressional intent, it is crucial to recognize the complexity of modern environmental legislation. It is not enough to examine one statute alone. Congressional intent can be accurately divined here only by examining the skein of overlapping federal water-related statutes which pertain to Puget Sound. Such an examination reveals that these statutes clearly do not preempt state regulation, rather, they invite it. As for conflicts between state and federal law, the antagonism must be actual, not merely potential. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). In this case the alleged conflicts are potential at best. The District Court's ruling was thus premature, especially in light of the sensitive issues of federalism involved.

II. Traditionally, this Court has upheld certain classes of state regulations in the face of an argument that the regulations impermissibly burden interstate or foreign commerce. The Washington Tanker Law falls within the parameters of these classes, since it is concerned with public health and welfare, transportation, protection of the state's natural resources, and regulation of harbors and navigation. In addition, the statute satisfies the sliding-scale balancing test enunciated by the Court in cases such as *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). This test requires that the regulation's benefits significantly outweigh the resulting burdens on commerce. When the burdens on commerce are minimal, and the benefits to the state are significant, the statute must be upheld. The scale is adjusted to favor the statute's validity when the interests protected by the statute are of the above-mentioned classes. Application of all these criteria demonstrates clearly that the Tanker Law does not violate the Commerce Clause of the Constitution.

III. Even though the Tanker Law includes foreign as

well as domestic vessels in its regulations, it does not infringe on the federal government's implicit power to conduct foreign affairs. It has long been recognized by this Court that states may regulate vessel traffic within the state's waters, even when the regulations incidentally affect foreign vessels. State statutes have been struck down as violative of the federal foreign affairs power only when they have "a direct impact upon foreign relations." *Zschernig v. Miller*, 389 U.S. 429, 441 (1968). Specifically, there is no evidence of any infringement of Canadian navigation rights caused by the Tanker Law. Nor does the statute violate the Constitution's exclusive grant of the treaty-making power to the federal government found in Article II, Section 2, Clause 2. Of the international treaties currently in force and ratified by the United States, none has suffered interference with its objectives as a result of the Tanker Law's operation.

## ARGUMENT

### I.

#### Washington's Tanker Law Has Not Been Preempted By Federal Law.

The issue of preemption, as framed by the facts of this case, requires recourse to two provisions of the United States Constitution. One, the Supremacy Clause (Article VI, Clause 2), provides:

This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The other, the Tenth Amendment, states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

A resolution of these two provisions is the task faced by this Court: to determine whether Sections 2 and 3 of Washington's Tanker Law, enacted in the exercise of an historically "reserved" police power, are superseded by or conflict with federal regulation. If Congress clearly intended its regulatory control to be exclusive, or if state law irreconcilably conflicts with federal law, only then does the Supremacy Clause require preemption. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

#### A. FEDERAL REGULATION OF PUGET SOUND WAS NOT INTENDED TO BE EXCLUSIVE.

Congressional intent to preclude state regulation of an activity covered by federal statute may be indicated by explicit statutory language. Alternatively, it may be inferred from (1) general statutory language and legislative history, (2) the pervasiveness of the federal scheme, (3) the need for uniform federal regulation, or (4) the interference by state law with a congressional purpose. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146-1147 (8th Cir. 1971), *aff'd. mem.*, 405 U.S. 1035 (1972).

Under any of these tests, it is critical that preemption not be inferred except upon the most cogent and unequivocal evidence. For Washington's Tanker Law is more than simply state action: it is the exercise of a traditional state police power designed to protect the health and economic well-being of its citizens.

Whenever claims of federal exclusivity have threatened to displace traditional state powers, this Court has declined

to find preemptive intent without indisputable proof thereof:

The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the "historic police powers of the States," is not to decree such a federal displacement "unless that was the clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230. In other words, we are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963).

The protection of natural resources has long been a recognized state police power. See *Manchester v. Massachusetts*, 139 U.S. 240 (1890); *Skiorotes v. Florida*, 313 U.S. 69 (1940). Even more impressive is the record of state regulation of waters. E.g., *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851); *The Steamboat New York*, 59 U.S. (18 How.) 223 (1855); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881). The State of Washington is not an interloper in federal domain. It has merely availed itself of powers sanctioned by the weight of history.

In this respect, the present case stands in stark contrast to *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and *Northern States Power Co. v. Minnesota*, *supra*. *City of Burbank* involved air traffic, a subject over which the federal government has exercised broad controls. Similarly, *Northern States* involved radioactive wastes, almost exclusively a matter of federal regulation. Clearly, deference to historic state police power was not appropriate in those cases; but it is central here.

Equally important is the purpose of Washington's Tanker Law. It is not a regulation designed merely for administrative convenience. Cf. *Sirrot v. Davenport*, 63 U.S. (22 How.) 227 (1859) (Alabama law requiring the registration of the names of steamboat owners conflicts with federal statutes). Washington has striven to protect a natural resource whose preservation is vital to the welfare of its citizens. See Pretrial Order ¶¶ 80-108. And whenever a state acts to protect its citizens in this manner, all presumptions weigh against a finding of preemption. *Kelly v. Washington*, 302 U.S. 1, 13 (1937).

It is especially noteworthy here that the Coast Guard vessel traffic regulations (which, should this Court affirm the judgment below, will be the sole protection for Puget Sound) are purely discretionary. Ports and Waterways Act of 1972 (PWSA), Title I, 33 U.S.C. § 1221. Hence a finding of preemption here will render Puget Sound as vulnerable as it is valuable. The enormity of this result fortifies the teaching of *Kelly v. Washington*, *supra*, that preemptive intent under such circumstances ought to be inferred, if at all, only with the utmost trepidation.

The tests for preemption, therefore, must not be applied in a vacuum. For the question here is not whether the states may encroach upon federal prerogatives: rather, it is whether federal statutes are to be construed to sweep away historic state police powers, except upon the most overwhelming evidence of congressional intent to do so.

With these principles in mind, we now turn to the tests for preemptive intent enumerated in *Northern States Power Co. v. Minnesota*, *supra* at 1146-1147:

*1. Whether Congress Has "Unequivocally And Expressly Declared" That Its Authority Is To Be Exclusive.*

Congress is certainly capable of expressing its will. Consider, for example, the following words from the Clean Air Act Amendments of 1970: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicle engines subject to this part." 42 U.S.C. § 1857f-6a.

Likewise, Congress provided in the Noise Control Act of 1972, that "no state or political subdivision thereof may adopt or enforce . . . any law or regulation which sets a limit on noise emissions." 42 U.S.C. § 4905(e)(1).

No comparable language appears in the PWSA; nor did the District Court purport to find explicit language of pre-emption.

In light of Congress' unhesitating use of express pre-emption language in the examples cited above, its failure to use such language in the PWSA is itself significant. It suggests, indeed, that a search for implied preemptive intent here may be somewhat akin to hunting for Lewis Carroll's elusive Snark.

*2. Whether Statutory Language Or Legislative History Imply Preemptive Intent.*

In the process of gauging congressional intent, the threshold question is where to look. Here the issue is whether Congress intended its regulation of inland waters to be exclusive. Obviously, therefore, the proper sources of congressional intent are all those federal statutes which are germane to inland waters—in particular, to water pollution, oil spills and estuaries like Puget Sound.

The Court below referred to the PWSA as a "comprehensive federal scheme." Yet, by restricting its analyses to the

PWSA, the Court ignored many of the relevant statutes. The issue of scope is especially critical in the environmental area, where federal laws assert overlapping jurisdictions. For instance, in the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1451, *et seq.* protection and management of the coast may be impossible without concomitant regulation of offshore activities such as oil drilling or tanker movement. The federal "scheme" under the PWSA cannot be functionally divorced from federal programs in other water-related areas.<sup>1</sup>

Examination of these other statutes indicates that Congress has not forbidden to the states a role in water management; that, in fact, it both expects and welcomes their participation.

a. The Federal Water Pollution Control Act Amendments of 1972 provide that "*it is the policy of Congress to recognize, preserve and protect the primary responsibility of the States to prevent, reduce and eliminate pollution.*" 33 U.S.C. § 1251. (Emphasis added.) And the FWCPA deals specifically with oil pollution in 33 U.S.C. § 1321. Again Congress provided, in express terms, that "[n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State." 33 U.S.C. § 1321(o)(2). The control of oil pollution is clearly the primary responsibility of the states in our federal system.

b. Congress declared in the Coastal Zone Management Act of 1972 (CZMA), that "*the key to more effective protection and use of the land and water resources of the coastal*

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<sup>1</sup> Consultation requirements, such as those in the CZMA, 16 U.S.C. § 1456(b), and in the PWSA, 33 U.S.C. § 1222(c), recognize the overlapping interdependence of federal water programs.

*zone is to encourage the states to exercise their full authority over the lands and waters of the coastal zone."* 16 U.S.C. § 1451(h). (Emphasis added.)<sup>2</sup> See also 16 U.S.C. § 1452 (b). As stated in S. Rep. No. 92-753, 92d Cong., 2d Sess. 5-6 (1972):

*It is the intent of the Committee to recognize the need for expanding state participation in the control of land and water use decisions in the coastal zone. . . . It is believed that the States do have the resources, administrative machinery, enforcement powers and constitutional authority on which to build a sound coastal zone management program. (Emphasis added.)*

A clearer instance of an "unequivocal and express declaration" of intent is difficult to imagine. But it encourages, not discourages state participation.

c. Also pertinent to Puget Sound is the Estuarine Areas Act of 1968, in which Congress made its intent unmistakable:

*In connection with the exercise of jurisdiction over the estuaries of the Nation and in connection with the benefits resulting to the public, it is declared to be the policy of Congress to recognize, preserve and protect the responsibilities of the States in protecting, conserving and restoring the estuaries in the United States.* 16 U.S.C. § 1221. (Emphasis added.)

d. Finally, we note the Deep Water Ports Act of 1974, 33 U.S.C. § 1501, *et seq.* While this Act does not bear squarely upon Puget Sound, its statement of national policy further refutes the suggestion that Congress intends to monopolize the regulation of coastal waters: "It is declared to

<sup>2</sup> The term "coastal waters" includes estuaries such as Puget Sound. 16 U.S.C. § 1453(b) (2).

be the purposes of the Congress in this chapter to . . . (4) protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law." 33 U.S.C. § 1501(a).

Importantly, even the PWSA itself does not evince a clear preemptive intent. Admittedly, Title I does provide that "[n]othing in this chapter . . . prevent[s] a State or political subdivision thereof from prescribing for structures only higher safety standards than those which may be prescribed pursuant to this chapter." 33 U.S.C. § 1222(b).<sup>3</sup> Crucial here is the language in the statute referring to "higher . . . standards than those which may be prescribed." This section, in other words, requires two elements in order for any preemptive effect to take place. First the Coast Guard must have set safety standards, which Title I states are purely discretionary. 33 U.S.C. § 1221. Second, the state must set safety standards higher than those promulgated by the Coast Guard. Until the Coast Guard promulgates such regulations, however, there is no basis for comparison, so that the state standards cannot be "higher."<sup>4</sup>

The House Report on Title I does state that "[s]tate regulation of vessels is not contemplated." H.R. Rep. 92-563, 92d Cong., 1st Sess. 15 (1971). But this is only natural, since Coast Guard regulation, which is a condition precedent to

<sup>3</sup> Even assuming *arguendo* that the carefully limited language of § 1222(b) was construed as broadly preemptive, nevertheless this would affect only § 3(2) of the Tanker Law. And since § 3(2) contains a severable proviso waiving the safety standards, it is not preempted in any case.

<sup>4</sup> The Coast Guard has promulgated design standards pursuant to Title II, 46 U.S.C. § 391a. See 33 C.F.R., pt. 157; see also 41 Fed. Reg. 1479 (Jan. 8, 1976). But the language of § 1222(b) specifies "standards which may be prescribed *pursuant to this chapter.*" (Emphasis added.)

the arguable preemptive effect of § 1222(b), *was* contemplated. That, after all, was the purpose of Title I: *i.e.*, to permit Coast Guard regulation. Again, though, until conflicting Coast Guard regulations are issued, state law is to remain intact, as is clear from 33 U.S.C. § 1222(e):

In determining the need for, and the substance of, any rule or regulation or the exercise of any other authority hereunder the Secretary shall, among other things, consider—

\* \* \*

(6) existing traffic control systems, services and schemes.

Lastly, § 1222(b) also provides that “[n]othing contained in this title supplants or modifies any . . . federal statute or authority granted thereunder.” This, then, brings us full circle; for it requires the recognition of the clearly non-preemptive language of the FWPCA, the CZMA, the Estuarine Areas Act of 1968, and the Deep Water Ports Act of 1974. Perhaps more importantly, § 1222(b) leaves intact “authority granted thereunder.” In this regard, the CZMA merits particular attention, for this Act deals with the allocation of powers in our federal system. It provides, in effect, that the states shall have dominant planning and regulatory control over the waters here involved, upon federal approval of state programs, federal actions in these areas are to be “consistent” with state programs. *See* 16 U.S.C. §§ 1451, 1456(c).

On balance, the PWSA indicates apparent congressional intent *not* to preempt state law. And the other federal water management statutes pertaining to Puget Sound specifically encourage state participation. Thus the only reasonable conclusion is that Congress intended to share the control of

water pollution with the states. There is no preemptive intent here.

3. *Whether “The Pervasiveness Of The Federal Regulatory Scheme As Authorized And Directed By The Legislature And As Carried Into Effect By The Federal Administrative Agency” Implies Preemptive Intent.*

Although the Court below described the PWSA as “comprehensive,” the use of this word does not necessarily imply preemptive intent. As this Court stated in *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 415 (1973):

We reject, . . . the contention that preemption is to be inferred merely from the comprehensive character of the federal work incentives program. The subjects of modern social and regulatory legislation often by their nature require intricate complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem.

In that same year, this Court also upheld Florida’s oil spill liability law even though the Federal Water Pollution Control Act included “a pervasive system of federal control over discharges of oil.” *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 330 (1973).

Moreover, as emphasized earlier, the powers of Title I of the PWSA are not mandated for implementation. A program which contains no statutory mandate, but only *discretionary* power to regulate in a “comprehensive” fashion, is not the type of federal program which is designed to preempt all state action. This is especially true under the facts of this case, where significant public welfare and safety considerations are involved.

Finally, the implementation of Title I by the Coast Guard is far from pervasive. The Coast Guard has established only a limited and relatively rudimentary system of vessel traffic control. *See* 33 C.F.R., pt. 161, subpart B. Contrast this with the blanket of sophisticated federal controls over air traffic:

Federal power is intensive and exclusive. Planes . . . move only by federal permission, subject to federal inspection in the hands of federally certified personnel and under an intricate system of federal command. The moment a plane taxis onto a runway, it is caught up in an elaborate and detailed system of controls. *Northwest Airline, Inc. v. Minnesota*, 322 U.S. 293, 303 (1944), quoted in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 663 (1973).

The PWSA as implemented leaves many gaps. With this regulatory background—a background particularly crucial in light of its discretionary nature—the PWSA can hardly be called so “pervasive” as to compel a finding of preemptive intent.

**4. Whether The Subject Matter Regulated Demands “Exclusive Federal Regulation In Order To Achieve Uniformity Vital To National Interests.”**

The waters of Puget Sound, being internal waters within the State of Washington, are of a type traditionally susceptible to diverse rather than uniform regulation. *Morgan's R.R. & Steamship Co. v. Louisiana*, 118 U.S. 455 (1885), which upheld Louisiana's maritime quarantine regulations, the Court declared:

The matter is one in which the rules that should govern it may, in many respects, be different in different localities, and for that reason be better understood and

more wisely established by local authorities. . . . “It belongs, also, manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, *and in regard to which no general rules applicable alike to all ports and landing places can be properly made.*” *Id.* at 455-466, quoting *Packet Co. v. Catlettsburg*, 105 U.S. 559, 563 (1881). (Emphasis added.)

The PWSA recognizes the inherently divergent characteristics of, and perforce the divergent rules applicable to, internal waterways such as Puget Sound. *See* 33 U.S.C. §1222(e)(2)-(5).

Such waterways have been subject to concurrent federal-state jurisdiction ever since *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851). Accordingly, there is clearly no need for national uniformity sufficient to preempt all state regulations.

**5. Whether “State Law Stands As An Obstacle To The Accomplishment And Execution Of The Full Purposes And Objectives Of Congress.”**

The purposes and objectives of Congress have been explicitly and succinctly enunciated in a number of federal statutes: the FWPCA, 33 U.S.C. §§ 1251, 1321(o)(2); the CZMA, 16 U.S.C. §§ 1451(h), 1452(b); the Estuarine Areas Act of 1968, 16 U.S.C. § 1221; and the Deep Water Ports Act of 1974, 33 U.S.C. § 1501(a)(4). These statutes not only authorize, but encourage state regulation.

It is particularly noteworthy that the State of Washington's Coastal Management Plan (to which the Tanker Law is related) has been approved by the Secretary of Commerce pursuant to the CZMA, 16 U.S.C. § 1456(b). This approval does not, in the words of the District Court,

"waive" preemption; but it does suggest that the Tanker Law is in harmony with federal purposes and objectives. In fact, upon the Secretary's approval, state policy became national policy. *See* 16 U.S.C. § 1456(c). The Tanker Law, then, can hardly be an "obstacle" to congressional objectives.

The search for congressional preemptive intent thus confirms the constitutional validity of Washington's Tanker Law. For there are no express words of preemption either in the PWSA or in the other relevant federal statutes. Rather, express language appears *welcoming* state regulation. The PWSA, as implemented, touches only upon limited areas in a field historically subject to concurrent jurisdiction. Indeed, jurisdiction is being exercised not just concurrently but cooperatively, through the CZMA.

In view of these facts; in view of the traditional character of state inland water regulation; in view of the critical importance of Puget Sound, both economically and ecologically, to the people of Washington; and in view of the discretionary nature of the PWSA—to find here the requisite "unambiguous congressional mandate" of preemption is not merely unwarranted, but singularly inappropriate.

#### B. THE TANKER LAW IN NOT IN CONFLICT WITH FEDERAL STATUTES.

A conflict exists between state and federal law only when "compliance with both . . . is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). Furthermore, this conflict must be real, not merely anticipated. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). As the Seventh Circuit observed recently, "in any case involving environmental legislation, it is actual conflict, not potential conflict that is

relevant." *Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69, 77 (7th Cir.), cert. den., 421 U.S. 978 (1975).

Only if ARCO is presently caught between the physically irreconcilable demands of state and federal law does a pre-emptive conflict exist.

##### 1. Sections 3(1) And 3(2) Do Not Conflict With The PWSA.

Neither the PWSA nor the Coast Guard regulations provide general authority for a vessel to navigate the waters of Puget Sound, nor do they forbid a state from barring certain types of vessel traffic. There is, therefore, no conflict between the "supertanker ban" in § 3(1) and the PWSA.<sup>5</sup>

Likewise, there is no conflict between § 3(2) and the PWSA. Notably, the design features in § 3(2) are less extensive than the smoke abatement requirements for vessels upheld in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), which provided no alternative means of compliance.<sup>6</sup>

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<sup>5</sup> The failure of the PWSA and Coast Guard regulations specifically to permit supertankers to enter into Puget Sound, or even to forbid states from doing so, is consonant with federal policy as expressed in the Deep Water Ports Act of 1974; i.e., to provide offshore ports, thereby eliminating supertanker traffic in crowded port areas like Puget Sound. *See* S. Rep. No. 93-1217, 1974 U.S. Code Cong. & Admin. News, 7529, 7538. In addition, *de facto* federal policy regarding supertanker use is that they be employed on long-haul trips—from the Persian Gulf rather than on the Alaska run. *See* Federal Maritime Administration, *Final Environmental Impact Statement on Tanker Construction Program IV-153, IV-156* (May 30, 1973).

<sup>6</sup> The *Huron* case is squarely on point here. It is of no significance that the state law upheld in *Huron* may have had a different purpose from that of the federal statute. "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

Even assuming that these requirements do conflict with the PWSA, § 3(2) contains a proviso permitting vessels not otherwise in compliance to enter Puget Sound anyway, if accompanied by a tugboat escort.

This proviso is the proper focus here, for the Washington legislature expected it to be used extensively; indeed, exclusively. *See 1975 Senate Journal* 1332:

My hope is that the net effect of this will be to require that oil tankers operating in the confines of the fairly limited area that we have in this bill in Puget Sound will have tug escorts; and it is really not the intent of the bill, . . . to redo the thinking of marine architects and marine engineers in redesign of all oil tankers.

ARCO has been shipping oil through Puget Sound in tankers that do not meet the Tanker Law's design standards ever since the Law became effective. (Pre-trial Order ¶¶ 13, 79). Thus, granting *arguendo* an irreconcilable conflict between these standards and the PWSA, compliance with both § 3(2) and federal law is still not a "physical impossibility," since ARCO can, and has, availed itself of the tugboat option. "[T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

The Court below ruled that the Coast Guard's mere consideration of tugboat escorts under the discretionary provisions of 33 U.S.C. § 1221(3)(iv) preempts the tugboat option in § 3(2). *See Department of Transportation, Coast Guard, Final Environmental Impact Statement—Regulations for Tank Vessels Engaged in the Carriage of Oil in*

*Domestic Trade* (Aug. 15, 1975). This ruling was premature, for until the effective date of actual regulations, there can be no conflict. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

## 2. There Is No Conflict Between § 2 And 46 U.S.C. §§ 215, 364.

Once again, we note that preemption occurs only in the event of an *actual* conflict between state and federal law. *Askew v. American Waterways Operators, Inc.*, *supra*. And the facts of this case present no such conflict.

Ostensibly, the state pilotage requirement in § 2 of the Tanker Law contradicts the federal pilotage requirements in 46 U.S.C. §§ 215, 364. However, no party caught between their apparently competing demands is before this Court. For ARCO has been *voluntarily* using state-licensed pilots on all tankers entering Puget Sound. (Pre-trial Order ¶ 74.)

It is well to remember that "even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it." *Rice v. Board of Trade of City of Chicago*, 331 U.S. 247, 255-256 (1947). An instance of genuine conflict should be awaited before resolving major issues of federalism. Consequently, the District Court's ruling on § 2, like its ruling on the tugboat proviso in § 3(2), was entirely premature.

## II.

### The Tanker Law Is A Constitutionally Permissible Exercise Of The State's Police Power, And Does Not Create An Improper Burden On Interstate Or Foreign Commerce.

It is clear that the case for federal preemption must fail. However, respondents attack the statute on two additional fronts which were not considered by the District Court: (A)

the Tanker Law constitutes an impermissible burden on interstate and foreign commerce, and (B) the statute conflicts with exclusive federal power to conduct foreign affairs.

**A. THE STATE INTERESTS WHICH THE STATUTE SEEKS TO PROTECT ARE COMPELLING.**

The value of the State interests involved in Washington's exercise here of its police power and the potential danger to those interests posed by oil pollution cannot be overemphasized. The State recently described the value of Puget Sound (together with the Columbia River) as being a mainstay of the State's "lifeblood":

The total livability of the state is dependent primarily on the quantity and quality of these waters and their tributaries. Not only are they valuable for navigation, both commercial and recreational, but fish and wildlife use them for homes, food sources and resting areas. They are also of the greatest import for their scenic and aesthetic values. . . . It is fair to conclude that the environment of Washington State, including the essential character of its citizens, is determined largely by the condition of the Columbia River and Puget Sound and their associated waters.<sup>7</sup>

An extensive documentation of Puget Sound's significance is found in the record below. In sum, the waterway possesses commercial, esthetic, recreational, and scientific values beyond any economic calculation.

It is uncontested that these resources would be devastated by a spill of crude oil. The insidious effect of oil pollution on marine environments has been elaborately documented.

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<sup>7</sup> From the first two paragraphs of the *amicus* brief submitted by the State of Washington in *Asken v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

*See, e.g., Hearings Before the Senate Commerce Committee on Recent Tanker Accidents, Jan. 11 and 12, 1977, part I* (statement of the Natural Resources Defense Council, Inc.). Recognizing the dangers of oil pollution, the state has decided to exercise its police powers in an effort to protect its most precious resources by checking the pollution at its greatest potential source: oil tankers.

Washington State's fears of a tanker spill devastating Puget Sound are eminently justified in light of the rash of accidents occurring after the District Court's decision. Between the months of December, 1976 and April, 1977, there have been fifteen tanker accidents in or near Amerian waters. In the last two weeks of December alone, these accidents resulted in the spillage of eight million gallons of oil. Costello, *Tanker Safety*, Editorial Research Reports 167 (March 4, 1977).

Significantly, the above accidents involved primarily conventional-size tankers; and supertankers of the class regulated by the Tanker Law are considered to possess an even greater potential for mishap than the conventional ships. One commentator has observed that as tankers get bigger, "so do their problems." They "get bigger and more technical and difficult to handle, and as they simultaneously set afloat upon the waters quantities . . . of dangerous and damaging substance, they are being sailed by unskilled or improperly trained or uncaring men whose minimal terms of employment are part of the basis of a profit for the shipowners and operators." The marine ecology cannot be expected to survive these superships if they "continue to be built and to be operated and sailed by the sort of standards that now largely prevail." Mostert, *Supership*, 326 (1974).

The maneuverability and speed control of a supertanker is unquestionably more limited than that of a standard tanker. Such a fact takes on added significance when one

considers that the route through Puget Sound primarily used by tankers serving the ARCO refinery is one of the narrowest commercial shipping channels in the Sound. In addition, the Sound is subject to weather extremes that often render it unusually hazardous for shipping. To all these factors must be added the amount of oil that potentially could be spilled in the event of an accident. A 120,000 DWT tanker has the capacity to carry approximately 34,500,000 gallons.

In view of an oil tanker's potential capacity for spillage and the recent incidents of accidents; in view of the increased potential danger of supertankers; and in view of the valuable resources that would be destroyed by an oil spill, it is clear that the State of Washington has a vital interest in regulating tanker traffic in Puget Sound. The Tanker Law serves this vital interest.

#### B. THE TANKER LAW IS THE TYPE OF STATE ACTION TRADITIONALLY FAVORED AGAINST COMMERCE CLAUSE ATTACKS.

The primary purpose for including the Commerce Clause in the Constitution was to check or eliminate the economic discrimination among the states that had been so rampant under the Articles of Confederation. *See, e.g., Baldwin v. Seelig*, 294 U.S. 525, 533-35 (1949). In accordance with this purpose, the Court has frowned upon state enactments which pressure out-of-state business to locate within the state, or which confer special economic benefits on native business at the expense of out-of-state business. Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 Harv. L. Rev. 1762, 1773-75 (1974). The Tanker Law does not keep company with such disfavored legislation. The legislative motive for enacting the Law was environmental protection, not economic discrimination against other states. In addition, the cost of compliance

with the statute will be absorbed primarily by Washington's own residents, since nearly two-thirds of the oil imported in the State is consumed by its own residents. (¶ 20.) These factors indicate that the Tanker Law is not among those types of legislation which the Court traditionally has disfavored.

It is conceded that the statute affects interstate commerce. However, the *Cooley* doctrine instructs us that such an effect is permissible in a broad range of state regulations dealing with local concerns. *Cooley v. Board of Port Wardens, supra*. The Court there upheld the power of a state to require that a Pennsylvania-licensed pilot be used when a ship navigates Pennsylvania waters. Even though the regulation incidentally burdened interstate commerce, it was permissible because Congress had not preempted it, and the subject matter was such that "it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits." 53 U.S. at 340.

Subsequent to *Cooley*, the courts have carved out various enclaves of state regulations which have been permitted in spite of their incidental restrictions on interstate and foreign commerce. Among these enclaves are several that are relevant for our consideration.

1. Public health and welfare concerns are favored. *See e.g., Huron Portland Cement Co. v. City of Detroit, supra*, (city's smoke control ordinance as applied to vessels engaged in interstate commerce); *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963) (state ban on price advertising by optometrists).

2. State regulations designed to protect the state's natural resources are also favored. *See, e.g., Cities Services Gas Co. v.*

*Peerless Co.*, 340 U.S. 179 (1950) (state conservation measure fixing the price of natural gas). *Manchester v. Massachusetts, supra* (state programs protecting wildlife and fisheries interests).

3. State statutes regulating harbors and docking facilities have been upheld. See, e.g., *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935) (state regulation of harbor traffic); *Cooley v. Board of Port Wardens, supra* (regulation of river and harbor navigation).

4. Finally, state transportation regulations have been upheld. See, e.g., *South Carolina Highway Department v. Barnwell Bros.*, 303 U.S. 177 (1938) (ban on certain size of trucks from state highways); *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92 (1933) (state ban on truck use of specific highway).

Even a cursory analysis reveals that the Tanker Law falls within these categories. It is clearly an enactment designed to preserve the health and welfare of Washington's citizens by preventing oil pollution and consequent destruction of a valuable state natural resource, Puget Sound. The statute seeks to attain this goal by promoting harbor safety through regulation of maritime transportaion.

However, we do not rely simply on a categorization or pigeonholing of the Tanker Law to support its validity in the face of a Commerce Clause attack. The statute must, and does satisfy the balancing test articulated most clearly in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Court there stated that "the extent of the burden [on interstate commerce] that will be tolerated will, of course, depend on the nature of the local interest involved. . . ." 397 U.S. at 142. Let us proceed to apply this test and weigh the Tanker Law's burdens on commerce against the benefits to the state.

#### C. ALLEGED BURDENS ON COMMERCE ARE NEGLIGIBLE.

Respondents first argue that the § 3(1) prohibition against tankers of greater than 125,000 DWT imposes an impermissible burden on interstate commerce. At the outset, we must note that tankers smaller than 125,000 DWT are perfectly capable of supplying the ARCO refinery in Puget Sound, and do so today. However, respondents claim that these smaller tankers are not as economically efficient as supertankers. The record contains no facts either directly supporting this assertion or refuting the argument that the economy of scale is asymptotic. The State Oceanographic Commission's estimates tend to support the "asymptote" argument, i.e., that there is a point where the predicted economies will be so small that the building of a larger ship to achieve them is not justifiable, and that this point is reached near the 125,000 DWT size.

Some additional facts must here be emphasized. First, Washington has not barred supertankers from all its waters, but only from a certain portion of them, namely Puget Sound. Second, the record is bare concerning ARCO's assertion that § 3(1) has disrupted ARCO's shipping activity. Third, the record is also devoid of any proof that the supertanker ban has had any effect at all on respondent Seatrain's ability to sell the two supertankers it is currently building. Given the above-noted failures of respondents to bear their burden of persuasion, we must conclude that § 3(1) does not burden interstate commerce.

A further argument of respondents is that § 3(2) of the Tanker Law places an unreasonable burden on commerce by means of the structural design requirements and the alternative tug escort requirement. We shall omit discussion of the design requirement's burdens, since those requirements are not mandatory. The Washington legislature expected that

the operative alternative would be the tug escort, and respondent ARCO has chosen to comply with that alternative. 1975 *Senate Journal* 1332.

The cost of a tug escort is extremely small relative to the total cost of refining and transporting oil. Furthermore, as the State of Washington argued so cogently to the District Court, it is not clear that even the minuscule tug cost would increase the net cost of petroleum products. As the Acting Chief of the Coast Guard's Office of Merchant Marine Safety stated: ". . . the transportation costs are a relatively small part of the price consumers pay today" for oil products. *Notice of Proposed Rule Making*, 41 Fed. Reg. 19672 (May 13, 1976). In addition, compliance with the tug escort safety provision reduces the likelihood of ARCO being held liable for oil spill damages caused by a tanker accident. Respondents have failed to demonstrate anything more than a *negligible* burden on interstate commerce caused by the tug escort provision.

An additional burden on commerce allegedly created by the Tanker Law is the possibility that conflicting state statutes will proliferate in this area. Such a burden is purely speculative, and, as such, cannot be included in our calculus of burdens and benefits. The Seventh Circuit recently stated (citing *Huron Portland Cement Co., supra* at 448): "The Supreme Court has indicated that in a case involving environmental legislation it is *actual* conflict, *not potential* conflict, that is relevant. *Proctor and Gamble Co. v. City of Chicago, supra* at 77. No actual conflict exists.

Respondents finally claim that commerce with foreign nations has been unconstitutionally burdened by the Tanker Law. Such alleged burdens are essentially the same as those of interstate commerce, shown above to be negligible. In addition, the record presents no evidence that oil tankers calling at or departing from Canadian ports have run afoul

of the statute. The record is also bare of any evidence that tankers greater than 125,000 DWT have ever called at any of the four Vancouver refineries. The flow of foreign commerce has not been impeded any more than has been interstate commerce. We have demonstrated above that the burdens on interstate commerce are either negligible or non-existent.

#### D. BENEFITS OF THE STATUTE FAR EXCEED ITS BURDENS.

Given that the Tanker Law's burden on commerce have been shown to be slight, the statute must be upheld if its benefits to the state outweigh the negligible burdens on commerce. The Court has recently reiterated that it uses a sliding scale in making such determinations based on the Commerce Clause, and that the scale is adjusted according to the nature of the case. *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 369 (1976). As discussed earlier in this brief, the Court favorably regards certain areas of state regulation, most significantly for our purposes, public health and welfare concerns; preservation of the state's natural resources; transportation concerns; and harbors and navigation regulations. As was also discussed earlier, the Tanker Law falls within the parameters of these subject areas. For this reason, the statute should be weighed on a scale balanced to favor the enactment's validity.

Respondents contend that the scales should be upset because the state has not demonstrated that the statute is the "least restrictive alternative" to achieving the state's goal. This contention must be disregarded. It is respondents, as challengers of the statute, who must bear the burden of proving that a less restrictive alternative exists. Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 Harv. L. Rev. 1762, 1781 (1974). Respondents

have not borne their burden in this case. The record does not contain facts sufficient to show that Washington's environmental goals could be achieved by means less restrictive than the Tanker Law.

Weighed on a scale balanced in favor of the statute's validity, as required by the Court's past decisions, the Tanker Law weathers the storm of a Commerce Clause attack. The minimal or speculative burdens on interstate and foreign commerce are clearly outweighed by the statute's compelling environmental benefits to the people of Washington. The State's exercise of its police power here is valid.

### III.

#### **The Tanker Law Creates No Conflict With The Federal Power To Make Treaties And Conduct Foreign Affairs.**

As demonstrated in Part I, the Tanker Law has not been preempted by any federal action in this field and particularly not by any Congressional intent to regulate oil tankers solely by means of international agreements. In Part II it was demonstrated that foreign commerce is not impermissibly burdened by the statute's operation. Respondents, however, press further the statute's alleged international implications, claiming that the regulations conflict with the federal government's Article II treaty-making power, and with the implicit federal power to conduct foreign affairs.

##### **A. CANADIAN NAVIGATION IS NOT HINDERED BY THE TANKER LAW.**

Respondents imply that there exists some absolute right of innocent passage to and from the British Columbia ports. The experts in international law disagree with such an implication. Professor Jessup states: ". . . it may be said that

the right of innocent passage does not guarantee to the vessel exercising it a total immunity from the processes of the local laws." Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, 122 (1927). (Emphasis added.) Professor O'Connell concurs: "The [right of innocent passage] is, however, subject to local regulations relating to pollution, pilotage, navigation, and protection of buoys and cables, etc., and even customs and public health." O'Connell, 2 *International Law*, 688 (1965). These rules were recognized by the Senate Commerce Committee during its deliberations on the PWSA. The right of innocent passage was not considered to be impeded by "maritime regulations which contribute to the safety of navigation or are of a sanitary or police character." S. Rep. No. 92-753, 92d Cong. 2d Sess., 2794 (1972).

In addition, no rights of navigation protected by British-American treaties are violated. Respondent focuses on two of those treaties. The first, Treaty with Great Britain in Regard to Limits Westward of the Rocky Mountains, 9 Stat. 869, contains a provision in its first Article that "the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties." However, no authority lends credence to respondents' contention that the "free and open" language must be construed as prohibiting regulation of navigation. On the contrary, the diplomatic history evidences a British willingness to permit regulation. Merk, *The Oregon Question*, 253 (1967). Such intent is also displayed by past British acquiescence in Washington State regulations of pilotage and other matters incidentally touching Canadian navigation. The British concern was primarily that Puget Sound navigation not be regulated in such a manner as to discriminate economically against non-American shipping. Merk, *id.*

The second British-American treaty about which respondents are concerned is the Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, 36 Stat. 2448. There is clearly no conflict here with the Tanker Law because the treaty describes navigational rights in "boundary waters." This term "boundary waters" has been understood to include only fresh waters. Bloomfield and Fitzgerald, *Boundary Water Problems of Canada and the United States*, 17 (1958).

Thus, the statute creates no impermissible interference with Canadian navigation rights as delineated by treaties and by the recognized right of innocent passage.

#### B. OTHER INTERNATIONAL TREATIES AND AGREEMENTS ARE NOT IMPAIRED.

Respondents suggest that the Tanker Law interferes with other treaties to which the United States is a party. Of the treaties which present the greatest potential for conflict with the statute, not all are currently in force. With regard to those actually in force, the Law does not impede the accomplishment of their purposes. A few examples will suffice to illustrate the point:

1. The International Convention for the Safety of Life at Sea, 1960, 16 U.S.T. 185, T.I.A.S. 5780, 536 U.N.T.S. 27, deals with the safety of human life aboard ships, not with preventing oil spills.

2. The International Regulations for Preventing Collisions at Sea, 1960, 16 U.S.T. 794, T.I.A.S. 5813, revised 1972, attempts to reduce the likelihood of collisions. The Tanker Law's regulations *promote* rather than hinder such a goal.

3. The International Convention for the Prevention of Pollution of the Sea By Oil, 1954, 12 U.S.T. 2989, T.I.A.S. 4900, 327 U.N.T.S. 332, with 1963 Amendments, specifically states that subscribing nations are not prohibited from acting within their own jurisdiction to regulate discharges of oil within 50 miles of Land.

It is evident that the Tanker Law does not interfere with the objectives of any international treaties currently in force which the United States has ratified.

#### C. FEDERAL POWER TO CONDUCT FOREIGN AFFAIRS REMAINS UNDILUTED.

The Court recently has reiterated its policy of upholding state enactments which incidentally affect foreign affairs. *DeCanas v. Bica*, 424 U.S. 351 (1976). The Court has disapproved of state statutes affecting foreign policy only in cases where the statute has "a direct impact upon foreign relations." *Zschernig v. Miller*, 389 U.S. 429, 441 (1968). Respondents have shown no such "direct impact," and the Law clearly does not usurp the federal government's power to formulate American foreign policy.

What the Tanker Law seeks to accomplish is simply to regulate vessel traffic within the state's waters. Such a goal has traditionally been recognized as a local prerogative, even when it affects foreign vessels. Chief Justice Taney long ago recognized that ". . . every vessel, from whatever part of the world she may come, is bound to take notice of [local regulations] and conform to them." *The James Gray v. The John Fraser*, 62 U.S. (21 How.) 184, 187 (1858). The principle was later reiterated: "Port regulations are supposed to be known to the shipowner before he sends his vessel on the voyage, and the general rule is that in sending her to any particular port he elects to submit to the lawful regu-

lations established at that port. . . ." *The Merrimac*, 81 U.S. (14 Wall.) 199, 203 (1871).

The Tanker Law, although touching upon the conduct of foreign affairs, does so in a way that has traditionally been permitted by this Court. Consequently, the statute in no way infringes upon the federal government's treaty power to conduct foreign affairs.

#### CONCLUSION

For the reasons stated herein, the decision of the Three-Judge District Court should be reversed.

Respectfully submitted,\*

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MOTION FILED  
JUL 3 1971

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1976

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No. 76-930

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DIXIE LEE RAY, GOVERNOR OF WASHINGTON, ET AL,  
*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, ET AL,  
*Appellees.*

---

MOTION FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE AND  
BRIEF OF MID-AMERICA LEGAL FOUNDATION  
AS AMICUS CURIAE

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IN THE  
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DIXIE LEE RAY, GOVERNOR OF WASHINGTON, ET AL,  
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*Appellees.*

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**MOTION OF MID-AMERICA LEGAL FOUNDATION  
FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE**

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Pursuant to this Court's Rule 42, Mid-America Legal Foundation ("Mid-America") hereby moves the Court for leave to file the attached brief as *amicus curiae*. Consent was refused by counsel for appellant, Christopher T. Bayley, King County Prosecuting Attorney. *Mid-America* has received the written consents of the appellees, Atlantic Richfield Company and Seatrain Lines, Inc. and the appellants, Dixie Lee Ray, Governor of the State of Washington; Slade Gorton, Attorney General of the State of Washington; John C. Hewitt, Chairman, and Harry A. Greenwood, Benjamin W. Joyce, Philip H. Luther, and J. Q. Paull, Members, Board of Pilotage Commissioners; Coalition Against Oil Pollution; National Wildlife Federation; Sierra Club; and Environmental Defense Fund, Inc. Appellant, David S. McEachran, Whatcom County Prosecuting Attorney, has no objection. Copies of these letters have been filed with the Clerk.

*Mid-America* has an interest in the disposition of the case which is before this Court pursuant to the appeal from the judgment and opinion of the three-judge court for the Western District of Washington at Seattle in *Atlantic Richfield Company v. Evans*, F. Supp. , 9 E.R.C. 1876 (W.D. Wash., 1977) based upon the expertise and purpose of this organization. The brief urges the Court to affirm the judgment of the court below.

*Mid-America* was organized in late 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation on matters of public interest at all levels of the judicial process. *Mid-America* takes special interest in questions of law of a national scope that have a direct effect on the mid-America region, namely, Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the decision below interprets the Constitution of the United States and the Ports and Waterways Safety Act of 1972 in a way which will have far-reaching effects on the supply and cost of oil and related products to refineries and, consequently, the general public in the mid-America region.

*Mid-America* has carefully reviewed the jurisdictional statement and record, motion to affirm and related briefs filed in this Court and respectfully submits that its brief, lodged herewith, presents at least one relevant and significant question of law and an analysis of the related authority which was not presented by the parties. It therefore believes that this question would not otherwise be presented, or at least adequately presented with related authority, although it would be, at least alternatively, dispositive of the issue as to the invalidity of the legislation in question. It is the view of *Mid-America* that the state legislation in question violates the Commerce Clause of the United States Constitution and related Federal legislation

as did the state legislation involved in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and that the interest of the public in non-coastal states, particularly mid-America, in the reasonable availability of Pacific ports for the ingress of Alaskan oil illustrates such violation and the need for the comprehensive national safety standards provided in the Ports and Waterways Safety Act of 1972.

Further, *Mid-America* believes that its argument that such considerations led to the adoption of The Constitution of the United States in place of the Articles of Confederation may be of value to the Court in its consideration of this case. *Mid-America* presents no separate statement with respect to the legal arguments briefed in the court below but concurs in the views of appellees thereon.

For these reasons, *Mid-America* respectfully urges the Court to grant this motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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Dated: July 27, 1977

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*Appellees.*

BRIEF OF MID-AMERICA LEGAL FOUNDATION  
AS AMICUS CURIAE

Mid-America Legal Foundation ("Mid-America") submits this brief as *amicus curiae* in support of Appellees in this case. A motion for leave to file this brief as *amicus curiae* is submitted simultaneously with this brief.

INTEREST OF AMICUS CURIAE

The interest of the *amicus curiae* is stated briefly in its motion for leave to file this brief, which is bound together with this brief. The *amicus curiae* considers it appropriate to expand on that statement here.

*Mid-America* has an interest in this case because the decision below interprets the Constitution of the United States and Ports and Waterways Safety Act of 1972 in a way which recognizes the interests of non-coastal states in the reasonable availability of ports for their commerce. While this consideration has general application, the particular state statute here

in question, Chapter 125, Laws of Washington 1975, 1st Extraordinary Sess. Substitute House Bill No. 527, relates directly to the interest of all states in the "lower 48" other than California, Oregon and Washington in the reasonable availability of Pacific ports for the ingress of Alaskan oil, particularly those in mid-America facing the most acute shortage of oil.

Before the end of 1977, the output of Alaskan crude oil available for loading onto tankers at Valdez, Alaska is expected to reach 1.2 million barrels per day or more than twice the capacity of West coast refineries to handle the high sulphur Alaskan crude. West coast refinery capacity can handle less than one-third of the 2 million barrel per day final capacity planned for the Alaskan pipeline to Valdez. Meanwhile, the Midwest alone faces a crude oil shortage estimated at 1 million barrels per day and the Nation is currently paying out around 41 billion dollars per year to foreign oil producers without a practical solution being readily available to combat the personal and economic dislocations of any renewed embargo by foreign producers.

The foregoing dilemma has been the subject of extended current review not only within the petroleum industry but in the general circulation media. See *e.g.* Chicago Daily News, June 22, 1977, "Big Alaskan Oil Need in Midwest"; U.S. News and World Report, June 20, 1977, "At Last Alaska's Oil Flows South" and "After Valdez: The Problems May Be Just Starting"; Chicago Tribune, April 7, 1977, "Supertankers Mean Superthreat in Shipping Alaskan Oil".

Basically, four solutions are currently discussed:

1. *International barter.* Trading Alaskan oil shipped to Japan for diverted Japanese controlled shipments from the Middle East to Gulf or East coast ports in the United States presents a potential for both environmentally and economically attractive solution. However, export of any U.S. reserves is thought to present problems of cogent

public explanation and credibility with respect to the energy crises generally. Barter of Alaskan oil shipped to Canadian West coast refineries for Canadian reserves in the mid-continent area would require prior conversion of the Canadian refineries to handle the high sulphur Alaskan crude in order to be workable.

2. *Tanker shipment to West coast ports followed by pipeline distribution.* A variety of proposals involving both old and new pipeline distribution from West coast ports are being studied and explored. The Washington statute involved in this case could affect directly the tanker shipments involved in a route from Alaska to mid-America through Puget Sound and a new pipeline across the "northern tier" of the Western United States to the Midwest. Another pipeline proposal for the distribution of Alaskan crude to the remainder of the Nation involves the reversal of an existing natural gas pipeline originally designed to flow westward from Texas toward California which is not currently in use. Were the Washington statute here involved allowed to stand, a similar statute in California could affect directly the tankers involved in that route from Alaska to the rest of the Nation. A variation of this proposal involves tanker shipment to Kitimat, British Columbia, a new pipeline to Edmonton and the use of existing lines from there to the Midwest.

3. *Trans Canada pipeline.* Pipeline transport directly from Alaska to the mid-continent area in the United States is a solution being discussed primarily in connection with natural gas rather than crude oil. The appellee, Atlantic Richfield Company, reportedly has suggested modification of Canada's Trans Mountain Pipeline which carries oil from Edmonton west to Vancouver to permit reverse flow of Alaskan oil from Vancouver to Edmonton and then through existing lines to the Midwest in order to more fully utilize the capacity of that existing system. The Wash-

ton statute here in question might directly affect this proposal since it applies to U.S. waters through which vessels pass at least occasionally enroute to and from Vancouver.

*4. Tanker shipment through the Panama Canal to Gulf and East coast ports.* In addition to the overall distance of shipment added by this roundabout route, the possibility of supertanker shipment from Alaska to Panama and from Panama to the Gulf and East coast ports with both onloading and offloading of smaller tankers capable of negotiating the canal in the Panama area presents the concomitant of environmental nightmares from dangerous operations of highly questionable necessity in negotiating a route of equally questionable necessity.

The foregoing summary of proposals receiving current media attention in the Midwest is not intended to be detailed or complete. Primarily, it reflects the deep concern created by the very real and serious oil shortage in mid-America. The environmental and economic costs of solution both in mid-America and along the potential routes to the oil fields of Alaska and elsewhere are also very real. While the statute here in question or similar legislation which might be enacted by any state having a West coast port would not be involved directly in the international barter and trans-Canada pipeline proposals, the ability of Midwest refiners and public to realize a fair share of the economic benefits in such solutions would be directly dependent on realistic availability of the alternative "all-American" solutions which would be effectively precluded or rendered significantly more costly by such state legislation.

## ARGUMENT

**1. The interest of the public in non-coastal states, particularly mid-America, in the reasonable availability of Pacific ports for the ingress of Alaskan oil illustrates the need for the national safety standards provided in the Ports and Waterways Safety Act of 1972.**

The Ports and Waterways Safety Act of 1972, Pub. L. 92-340, 86 Stat. 424, confirms that comprehensive national standards were required, in the judgment of Congress, to prevent "environmental harm from vessel or structure damage, destruction or loss" in addition to the more traditional objective of preventing "damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States". Having stated in Section 101 of the Act that the purpose of the legislation was to prevent environmental harm from "vessel or structure damage", Congress went on in Section 102 to state that nothing in the title should *inter alia*, prevent a state or political subdivision thereof from prescribing "for structures only" higher safety equipment requirements or safety standards than those which may be prescribed pursuant to that title.

Such language is a clear application of the maxim "*expressio unius est exclusio alterius*". By utilizing the "structures only" language in Section 102 with the antecedent "vessel or structure damage" with respect to environmental protection in Section 101, Congress must be taken to have provided that the title does prevent any state or political subdivision thereof from prescribing higher safety equipment requirements or safety standards "for vessels", than those which may be prescribed pursuant to that title by the Secretary of the department in which the Coast Guard is operating. Such language is explicit. It is express and its legislative history unequivocally documents that it was precisely so intended. The House Report states that the language "is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels

is not contemplated," and that "higher vessel equipment regulations and standards by States should apply to structures only and not to vessels." H.R. Rep. No. 92-563, 92d Cong., 1st Sess. 15 (1971).

*Mid-America* concurs in the legal arguments presented by the appellees to the three-judge court below and will not separately present such arguments. Instead, *Mid-America*, as *amicus curiae*, presents to the Court the interest of the public in states without Pacific ports in the reasonable availability of such ports for the ingress of Alaskan oil. *Mid-America* would note *arguendo* that such interest may be considered by this Court as relating only to the one-third portion of oil imported by the state of Washington which historically has been consumed in other states as recognized by appellants themselves. (Br. p. 83 n. 88). Nevertheless, *amicus* notes that by the end of 1977, West coast refining capacity of approximately 600 thousand barrels per day is expected to be able to handle only about one-half of the available Alaskan crude and less than one-third of the planned final capacity for the Alaskan pipeline to Valdez of 2 million barrels per day. Whether the exact interest of other states in the oil imports of Washington be "only" one-third or more than two-thirds, the significant point is that such tanker commerce in oil clearly and beyond question concerns more states than Washington. Furthermore, whether viewed historically in retrospect or prospectively in light of the reasonably anticipated potential, that portion which concerns other states clearly is substantial.

In *Gibbons v. Ogden* 22 U.S. (9 Wheat) 1 (1824) Chief Justice John Marshall explained that under the Constitution, the United States is a single nation as to "commerce which concerns more states than one." 22 U.S. at 194. Commerce among the several states does not "comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state,

and which does not extend to or affect other states." *Ibid.* The commerce here involved is not completely internal to the State of Washington. It is not carried on between man and man in that state, or between different parts of that state. On the contrary, the oil tanker commerce here involved both extends to and affects other states and even foreign nations. Clearly, under the teaching of *Gibbons*, the Washington statute purports to regulate "commerce which concerns more states than one" and as to which the United States is a single nation subject to exclusive regulation by the national government through Congress. U.S. Const. Art. I, Sec. 8.

The attempt of appellants to distinguish *Gibbons* on the ground that it "involved an express license to engage in interstate business between two points" (Br. pp 67-8 n. 75) is factually incorrect. This Court expressly dealt with such argument as follows:

"The license must be understood to be what it purports to be, a legislative authority to the steam-boat Bellona, 'to be employed in carrying on the coasting trade, for one year from this date.'

"It has been denied that those words authorize a voyage from New Jersey to New York. It is true, that no ports are specified; but it is equally true, that the words used are perfectly intelligible, and do confer such authority as unquestionably, as if the ports had been mentioned. The coasting trade is a term well understood.

\* \* \* The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York, is one of those operations." 22 U.S. at 214

Here, with the advent of the Alaskan oil bonanza in the midst of the national energy crisis and the reservation of transportation thereof for U.S. vessels, it cannot be doubted that voyages from Valdez to Puget Sound or to Long Beach or San Francisco are appropriate operations for any vessel "enrolled in the coastwise trade".

In *Gibbons* this Court struck down the New York steamboat monopoly legislation on the principle that acts of state legislatures which "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution," are invalid under the Supremacy Clause. 22 U.S. at 211. There was no requirement for absolute inconsistency under any and all circumstances as urged by appellants and the *amici* briefs filed in support of their position. It was quite possible for a steamboat operator to comply with both the federal and New York laws. Indeed, many had. The core of unconstitutionality here is exactly the same as in *Gibbons*. Washington in 1977, just like New York in 1824, cannot exclude from its waters, which are also navigable waters of the United States, vessels which are duly enrolled and licensed to operate in the coasting trade under all applicable laws of the United States. No state may impose any additional requirements which "interfere with, or are contrary to" the authority and privilege which Congress has provided shall accompany due compliance with the federal law. In *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), this Court recently reaffirmed the principle as follows: "A state may not exclude from its waters a ship operating under a federal license. *Gibbons v. Ogden*, 9 Wheat. 1." 362 U.S. at 447.

The original coasting act of 1789 was one of the first acts passed at the first session of the first Congress. See, An Act for Registering and Clearing Vessels, Regulating the Coasting Trade and for other purposes, approved September 1, 1789, First Cong., First Sess. Ch. 11, 1 Stat. 54. Thus, the principle reflected in the decision below that a state may not exclude from its waters a ship operating under a federal license which was first articulated for this Court by Chief Justice John Marshall in 1824 and specifically reaffirmed by this Court in 1960 can hardly be said to interfere with any "traditional" right of an individual state to protect its waters. Under the Constitution of the United States, there simply never has been any

such right as the State of Washington sought to exercise in the statute invalidated by the three-judge court below.

**2. Such considerations led to the adoption of The Constitution of the United States in place of The Articles of Confederation.**

*Mid-America* submits that the mistake of the Washington legislature in promulgating the subject law is analogous to the mistake of the English parliament in promulgating the tea tax and the Stamp Act. Whether tea or stamps were appropriate vehicles to raise revenue was a matter of little or no concern. On the other hand, the principle of taxation without representation sparked a revolution. Here the issues are not whether double hulls are reasonable requirements for tanker transport of oil or whether supertankers are altogether unreasonable for such purpose of Puget Sound. The issue is whether the people of mid-America and other states without Pacific ports shall have any voice or representation in the resolution of such questions.

The Senate Report on the Ports and Waterways Safety Act of 1972 is replete with detailed information pertaining to such matters. S. Rep. 92-724, 92nd Cong., 2d Sess. (1972), 1972 U.S. Cong. & Adm. News 2766 at 2771-2780. Nevertheless, Congress elected to authorize the Secretary of the department in which the Coast Guard is operating to consider such information, pursue its further amplification and development and promulgate rules and regulations to implement the same environmental safety objectives which the Washington legislation purports to serve. Congress pointedly refused to make the judgments reflected in the Washington statute. Instead, it authorized, but did not direct, the Coast Guard to do so and provided that it should implement its judgment only after appropriate notice and an opportunity for all interested parties to be heard. Uniform and identical standards for all ports are nowhere mandated. Uniform and comprehensive considerations and procedures are the requirements contemplated, not

identical rules applicable to every U.S. port regardless of its individual characteristics. The Constitution expressly precludes the preference of the ports of one state over those of another. U.S. Const. Art. I, Sec. 9. But equality or identity in every respect certainly is not required.

Thus, the mistake of the Washington legislature is not that it was wrong about oil tankers in Puget Sound anymore than parliament had been wrong about tea and stamps as vehicles to raise revenue, but rather that it precluded any voice or representation for the people of other states on matters directly affecting their commerce with states other than Washington and with foreign nations.

The disdain for jeopardy to the Union which Daniel Webster must have reflected when describing the retaliatory legislation of Connecticut and New Jersey in his argument on behalf of Gibbons is not difficult to imagine. 22 U.S. at 4-5. While no retaliatory action has been taken with respect to the subject Washington statute, Governor Thomas L. Judge of Montana recently voiced sentiments which could have led to such action in times past, when he observed that Washington benefits from energy which causes environmental harm to Montana and complained that Washington has prevented fuel from reaching Montana through Puget Sound. Environment Reporter, Current Developments p. 1682. (B.N.A. March 4, 1977).

Fully mindful of similar considerations which then had recently led to the American revolution and Declaration of Independence, the "Fellow Citizen" who authored "The Political Establishments of the United States of America, In a Candid Review of their Deficiencies, together with a Proposal of Reformation, Humbly addressed to the Citizens of America," (published in Philadelphia, in 1784, and republished with additions and alterations in 1787 in the New-Haven Gazette and Connecticut Magazine), observed in the installment published June 21, 1787, that

"Philadelphia, and New-York import the principal part of the goods consumed in Connecticut, New-Jersey and Delaware, who consequently pay the duty on them; but Pennsylvania and New-York enjoy the benefits of it. So that this way and means of raising public monies, which ought to be applied to the benefit of the whole, becomes partial."

Francis N. Thorpe in his Constitutional History of the United States (Vol. I p. 279, Callaghan & Company, Chicago, Illinois 1901) observed that the last blow against the credit of the Confederation was the refusal of New Jersey to pay its quota of the Congressional assessment due to resentment against the power of New York to collect from inhabitants of New Jersey by means of duty on imports. The partiality observed as well as all comparable impositions by port states on non-port states later were expressly prohibited in the Imports and Exports Clause and the Duty of Tonnage Clause in the Constitution. U.S. Const. Art. I, Sec. 10.

The reflection of environmental concerns in the regulation of ports and waterways was recognized by the Congress as a new concept in 1972. However, appellants themselves as well as the *amici* supporting their position recognize the analogy of the burden on commerce inherent in the subject statute. (Aplts. Br. p. 83, n. 88, see also e.g. Am. C. Br. Calif. et al pp. 39-40). They argue, however, that such burden, though recognized as very real, falls primarily on persons subject to the jurisdiction of Washington and was not imposed for any evil purpose to favor its own commerce over that of any other state or nation. In earlier times such burdens were most frequently cast in the form of imposts or duties on imports or exports or a duty of tonnage. Under the Constitution, in marked contrast to the Articles of Confederation, no state is permitted to lay imposts or duties on imports or exports or a duty of tonnage without the consent of Congress. U.S. Const. Art. I, Sec. 10.

The arguments of the appellants and the *amici* supporting their position could be applied with equal logic to the pro-

scribed imposts and duties. New York quite likely consumed a greater portion of many imports taxed by them than did New Jersey. Furthermore, the use of imposts and duties to discourage certain items of commerce and, by exemptions, to encourage other items of commerce was not generally a problem under the Articles of Confederation. Comparable benefits and burdens on comparable items coming from or destined for other states under the Articles were generally and freely accorded. The problem, as explained by the "Fellow Citizen", *supra*, was the partiality which resulted from all of the benefits being received by a port state from a burden being shared proportionately with other states according to the use of the items involved.

Here the State of Washington has allocated unto itself most of the benefits which might be realized from the economic burden on the import of oil which will be shared proportionately by other states according to use. The other states might even agree that such sharing is fair and reasonable in view of the circumstance that Washington likewise would bear a disproportionate amount of the environmental harm sought to be prevented. What is improper in our federal system is for Washington, without the consent of Congress, to exclude any voice or representation for such other states in the decision of whether and how much of such a burden should be incurred. The Constitution provides explicit protection to Washington and every other port state against any preference to the ports of one state over the ports of any other state in any regulation of commerce or revenue. U.S. Const. Art. I, Sec. 9.

### CONCLUSION

For the foregoing reasons, the decision below based upon the opinion of the three-judge court in the United States District Court for the Western District of Washington at Seattle should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.

FILED

JUL 29 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-930

DIXY LEE RAY, Governor of the State of Washington, *et al.*,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON

MOTION AND BRIEF OF THE  
MARITIME LAW ASSOCIATION OF THE  
UNITED STATES, *AMICUS CURIAE*

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IN THE  
**Supreme Court of the United States**  
**October Term, 1977**

**No. 76-930**

---

DIXY LEE RAY, Governor of the  
State of Washington, *et al.*,

*Appellants,*  
v.

ATLANTIC RICHFIELD COMPANY, *et al.*,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON

---

**MOTION FOR LEAVE TO FILE BRIEF  
*AMICUS CURIAE***

---

The Maritime Law Association of the United States respectfully moves the Court for permission to file the annexed Brief, as *Amicus Curiae*.

The nature of the Association and its intense interest in this vitally important appeal are outlined in the opening pages of the Brief, to which the Court is respectfully referred.

The Association believes the Brief may be of assistance to the Court in reaching its decision, as it focuses attention

on the effect of the "Admiralty" Clause of the Constitution (Article III, Section 2, Clause 3) on the issues involved, whereas Appellees will presumably emphasize the effect of the "Supremacy" Clause (Article VI), and the "Commerce" Clause (Article I, Section 8, Clause 3), as they did below.

Appellants Dixy Lee Ray, Governor of the State of Washington, and David S. McEachran, Esq., Whatcom County Prosecuting Attorney, and Appellees Atlantic Richfield Company and Seatrain Lines, Inc. have consented to the filing of the annexed Brief. Appellant Christopher T. Bayley, Esq., King County Prosecuting Attorney, has indicated consent on condition that the Brief adheres to the Pre-trial Order and does "not introduce any factual or evidentiary material". The Brief is in conformity with this condition. The Attorneys for the other Appellants have not as yet responded to a request for their consent.

Respectfully submitted,

DAVID R. OWEN, President

NICHOLAS J. HEALY, Chairman  
Committee on Uniformity of  
United States Maritime Law

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Law Association of the United  
States, *Amicus Curiae*

IN THE

## Supreme Court of the United States

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No. 76-930

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---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON

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### BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*

#### Interest of *Amicus Curiae*

The Maritime Law Association of the United States (the Association) is a national bar association founded in 1899, with a nationwide membership of more than 2,200 practicing admiralty attorneys, federal judges, professors of admiralty law, and others interested in the maritime law. It is an affiliate of the American Bar Association and is represented in that association's House of Delegates. The Association's attorney members represent the full range of

maritime interests: shipowners, charterers, cargo owners, seamen, passengers, owners of shore-front properties, marine insurance underwriters, the federal and a number of state and local governments, and other actual or potential maritime litigants. Its purposes are set forth in its Articles of Association:

The objects of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, and to act with foreign and other associations in efforts to bring about a greater harmony in the Shipping Laws, regulations and practices of different nations.

In furtherance of these objectives the Association has sponsored such federal maritime legislation as the Salvage Act (1912),<sup>1</sup> the Carriage of Goods by Sea Act (1936)<sup>2</sup> and the Admiralty Extension Act (1948),<sup>3</sup> and has cooperated with Congressional committees in the formulation of other maritime legislation, including the Water Quality Improvement Act of 1970,<sup>4</sup> the 1972 Water Pollution Control Act Amendments,<sup>5</sup> the implementation of the 1972 Convention for Preventing Collisions at Sea,<sup>6</sup> and the Federal Court Jurisdiction Bill.<sup>7</sup> From time to time the Association recommended improvement in the former General Admiralty Rules to this Court, and in the 1960's it assisted the Court's

<sup>1</sup> 46 U.S.C. §§ 727-31.

<sup>2</sup> 46 U.S.C. §§ 1300-15.

<sup>3</sup> 46 U.S.C. § 740.

<sup>4</sup> 84 Stat. 91-107, as amended 33 U.S.C. §§ 1251-1376.

<sup>5</sup> 33 U.S.C. §§ 1251-1376.

<sup>6</sup> — U.S.T. —, T.I.A.S. No. 8587 (effective July 15, 1977). See generally H.R. 5446, 94th Cong., 1st Sess.

<sup>7</sup> S. 1876, 93d Cong., 1st Sess.

Advisory Committee on Admiralty Rules in the unification of the General Admiralty Rules and the Federal Rules of Civil Procedure.

The Association has actively participated, as one of the 34 national maritime law associations constituting the Comité Maritime International,<sup>8</sup> in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions, such as those relating to Assistance and Salvage (1910),<sup>9</sup> Ocean Bills of Lading (1924),<sup>10</sup> Collision (1910),<sup>11</sup> Limitation of Liability of Owners of Sea-Going Vessels (1957),<sup>12</sup> Maritime Liens and Mortgages (1968),<sup>13</sup> and Civil Liability for Oil Pollution Damage (1969),<sup>14</sup> and standard contractual provisions such as the York-Antwerp Rules of 1974.<sup>15</sup>

A first step toward achievement of the Association's objective of international harmony in the maritime laws of the world's trading nations must be a uniform national maritime law in those of them which, like the United States, have a federal system of Government. Until very recent years such uniformity was the unquestioned national policy, as expressed by the Congress and acknowledged repeatedly

<sup>8</sup> These now include the national associations of Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, Denmark, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, India, Ireland, Israel, Italy, Japan, Jugoslavia, Mexico, Morocco, The Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, and Venezuela.

<sup>9</sup> 37 Stat. 1658 (1913).

<sup>10</sup> 51 Stat. 233 (1937).

<sup>11</sup> 6 Knauth's Benedict on Admiralty 37 (7th ed., rev.) [hereinafter "Benedict"].

<sup>12</sup> 6A Benedict 634.

<sup>13</sup> Singh, International Conventions of Merchant Shipping (8 B.S.L.) 1397 (2d Ed. 1973). See generally 6A Benedict 601-607.

<sup>14</sup> 6A Benedict 951.

<sup>15</sup> 2 Benedict § 181.

in the decisions of this Court. The Association has therefore been greatly disturbed by the growing tendency of state legislatures to enact disparate laws in the maritime field. Accordingly, at the Association's 1975 Annual Meeting the following Resolution was unanimously adopted:

**RESOLVED**, that the Maritime Law Association of the United States considers it of the utmost importance and in the public interest that maritime law be uniform to the maximum extent possible throughout the United States; it is greatly concerned about, and strongly opposes the current proliferation of disparate state and local legislation adversely affecting such uniformity and advocates that Congress consider the matter and enact legislation designed to protect and maintain national uniformity in maritime law.

Substantially identical resolutions were also adopted at the 1976 Annual Meeting of the American Bar Association, and at the 1975 Annual Meeting of the Propeller Club of the United States (a national association of persons interested in all phases of maritime commerce).

The Association's members are fully cognizant of the need for a clean marine environment. Broad, enforceable, uniform national laws and international conventions designed to prevent water pollution to the extent possible, and to provide the means for removing such discharges of oil and other polluting substances as may occur, have received and continue to receive the enthusiastic support of the Association, as well as that of other responsible groups concerned with marine ecology.

In questioning the constitutionality of the Washington State "Tanker Law" (Chapter 125, 1975 Laws of the State

of Washington, §§ 88.16.170 *et seq.*, Rev. Code of Washington), the Association is in no way withdrawing its support for sound legislation designed to improve the marine environment; it is simply urging that by its very nature the sea is international, and that until such time as international uniformity can be fully achieved, the public, as well as those interested in all phases of maritime commerce, can best be served if such regulation is federal, and not the "crazy-quilt regulation of the different States".<sup>14</sup>

## ARGUMENT

**The District Court Correctly held the Washington State Tanker Law unconstitutional, and its decision should be affirmed.**

In the Association's submission, the three-judge district court was entirely correct in holding the Tanker Law unconstitutional for the reason that it "conflicts with federal law preempting the same subject matter". Indeed, one of these conflicts—that between section 2 of the Tanker Law and the Federal Pilotage Statute, 46 U.S.C. § 364—is now conceded by Appellants. See Appellant's Brief, p. 10n.9.

The Association submits that the Tanker Law is invalid for the further reasons that it imposes undue burdens on interstate and foreign commerce, infringes upon the federal treaty-making power, and violates international treaty obligations assumed by the national Government.

These conflicts were thoroughly discussed by Appellees in their District Court brief, and will undoubtedly be discussed with equal thoroughness in their brief on this appeal. It would therefore be an unnecessary imposition on the

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<sup>14</sup> Frankfurter, J., in his concurring opinion in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 323 (1955).

Court's time for the Association to analyze them in any detail. The Association will therefore limit itself to citing one example of the serious conflicts between the Tanker Law and federal maritime legislation—the conflict between Section 3 and the Ports and Waterways Safety Act of 1972 ("PWSA"), 33 U.S.C. §§ 1221-1227 and 46 U.S.C. § 391a.

Section 3 of the Tanker Law is plainly unconstitutional in unqualifiedly prohibiting the entry into Puget Sound of all oil tankers in excess of 125,000 deadweight tons ("DWT") and prohibiting the entry of loaded oil tankers of 40,000 to 125,000 DWT unless they carry the special equipment specified in the Section, or, alternatively, are under tug escort of a kind prescribed in the Section.

PWSA provides for a comprehensive regulatory scheme controlling vessel movements and establishes standards for the design and construction of oil tankers—precisely the same subjects as the Tanker Law is designed to regulate.

Among the announced purposes of PWSA are the protection of "the navigable waters and the resources therein from environmental harm", 33 U.S.C. § 1221, and the prevention or mitigation of "hazards to life, property, and the marine environment." 46 U.S.C. § 391a. The announced reasons for enactment of the Tanker Law closely parallel these purposes of PWSA. See Ch. 125, Rev. Code of Washington, § 88.16.170. It cannot be said, therefore, as was said in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), that there is no overlap between the scope of the federal law and that of the state legislation because their purposes are different. Here, the purposes are substantially the same, and the environmental purpose of the Tanker Law was plainly preempted by PWSA.

PWSA authorizes the Secretary of Transportation ("Secretary") to deny entry into the navigable waters

of the United States to tankers in violation of design and construction standards established by the Secretary (46 U.S.C. § 391a [13]) and to establish limitations on the size of vessels using congested waterways such as Puget Sound (33 U.S.C. § 1221[3] [iii]). Therefore, unless and until the Secretary prohibits tankers in excess of 125,000 DWT from entering Puget Sound, they must be free to do so, provided they meet design and construction standards established by the Secretary. In completely prohibiting the entry of such Tankers into Puget Sound, Section 3(1) of the Tanker Law is in outright conflict with PWSA.

Pursuant to authority delegated by the Secretary under PWSA (46 U.S.C. § 391a[7]), the United States Coast Guard has established rules and regulations "for the protection of the marine environment", establishing design and construction standards for oil tankers engaged in the coastwise trade. 40 Fed. Reg. 48,280 (Oct. 14, 1975), 33 C.F.R., Part 157, *amended*, 41 Fed. Reg. 1,479 (Jan. 8, 1976). These standards differ widely from the design and construction standards which tankers of 40,000 to 125,000 DWT must meet as a condition to using the waters of Puget Sound without a tug escort of the kind prescribed in the proviso to Section 3(2) of the Tanker Law. By implication, coastwise tankers complying with Coast Guard design and construction standards must be free to navigate in Puget Sound, and the Tanker Law is in direct conflict with PWSA in denying them access unless accompanied by special tug escorts, if they do not comply with the standards established in the Tanker Law—standards which, it should be noted, cannot be met by any 40,000 to 125,000 DWT tanker in service today.

The fact that Section 3(2) of the Tanker Law contains a proviso permitting the entry of loaded 40,000 to 125,000 DWT tankers not designed and equipped in accordance

with the Section if escorted by tugs of specified horse-power does not resolve the conflict between that Section and PWSA. Under PWSA, 33 U.S.C. § 1221 (3) (iii) and (iv), the Secretary is authorized to control traffic in especially hazardous areas, "or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by \*\*\* (iii) establishing vessel size and speed limitations and vessel operating conditions; and (iv) restricting vessel operation, in a hazardous area or under hazardous conditions, to vessels which have particular operating characteristics and capabilities which he considers necessary for safe operation \* \* \*." The Coast Guard, to whom the Secretary's authority was delegated, has adopted Rules and Regulations for Vessel Traffic Systems in Puget Sound, 39 Fed. Reg. 25,430 (July 10, 1974), 33 C.F.R. §161, Subpart B. These Rules and Regulations do not require either the design and construction features specified in Section 3(2) of the Tanker Law for loaded tankers of 40,000 to 125,000 DWT or the tug escorts required by the proviso to that Section when such tankers are not so designed and constructed. Since it is implicit in PWSA that vessels which comply with the Rules and Regulations issued thereunder with respect to a particular waterway will be permitted to use it, and since Section 3(2) of the Tanker Law would deny access to vessels complying with the Coast Guard Rules and Regulations but not with that Section, the Tanker Law is plainly invalid as in conflict with the Coast Guard Rules and Regulations relating to Puget Sound, issued under PWSA. The fact that the federal regulations may not be as restrictive as those of the Tanker Law is of no significance; the area is one regulated by federal statutes and rules enacted and promulgated pursuant to the Constitution. The Tanker Law is therefore preempted by the federal regulatory

scheme. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

Even if an intention to preempt had not been expressed in PWSA, such an intention would be plainly implied from the comprehensive regulatory scheme embodied in that statute, as the foregoing discussion shows. But an intention to preempt was in fact expressed in PWSA. After authorizing the Secretary to regulate shoreside structures as well as vessels, PWSA provides that it is not intended to preclude the states from establishing "*for structures only*"<sup>17</sup> higher safety standards than the Secretary might prescribe. 33 U.S.C. § 1222(b)(1). It is clear from this language, and made doubly so by the legislative history of PWSA, that it was intended to permit the states to go beyond federal requirements in establishing safety standards *for shoreside structures*, and, conversely, to prohibit the states from going beyond federal requirements *with respect to vessels*. See H. R. Rep. No. 92-563, 92d Cong., 1st Sess. 15 (1971), where, in referring to the phrase "*for structures only*", it is stated that this language was inserted in the bill which became PWSA to make "*absolutely clear the intent of Congress to preempt state regulation of vessels*."

*Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), is clearly distinguishable, for the reason, among others, that the federal Water Quality Improvement Act of 1970,<sup>18</sup> which, like the State Statute there involved, was concerned with oil pollution, contained an express disclaimer of any intention to preempt. PWSA, on the other hand, as has been shown, contains an express preemption provision.

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<sup>17</sup> Emphasis throughout has been supplied, except where otherwise indicated.

<sup>18</sup> 84 Stat. 91-107, as amended 33 U.S.C. §§ 1251-1376.

In the main, the federal statutes and regulations with which the Tanker Law is in conflict relate to interstate and foreign commerce, and they are therefore clear expressions of the constitutional grant of authority to regulate such commerce. But even when interstate and foreign commerce is *not* involved, such federal statutes and regulations are authorized by the Admiralty<sup>19</sup> and "Necessary and Proper"<sup>20</sup> Clauses of the Constitution. It has long been established that those clauses, in combination, not only form the source of the admiralty jurisdiction of the federal judiciary, but vest Congress and the federal courts with the paramount power to determine the substantive maritime law to be applied throughout the United States. *The Thomas Barlum*, 293 U.S. 21 (1934); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

The effect of the Admiralty Clause was explained by this Court in *The Lottawanna*, 88 U.S. 558, 574-75 (1876), more than a century ago:

\* \* \* The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction'. \* \* \* One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law

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<sup>19</sup> Article III, Section 2, Clause 3.

<sup>20</sup> Article I, Section 8, Clause 18.

under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

This Court has repeatedly held that the substantive maritime law is subject to modification by Congress "as experience or changing conditions might warrant". *Panama R. R. Co. v. Johnson*, 264 U.S. 375 (1924); *Crowell v. Benson*, 285 U.S. 22, 39 (1932); *The Thomas Barlum, supra*.

Since Congress has paramount power to legislate in the maritime field, federal maritime legislation is the supreme law of the land, and under the Supremacy Clause,<sup>21</sup> no state statute is valid if it contravenes such legislation. Thus, since the Judiciary Act of 1789<sup>22</sup> made the jurisdiction of the United States district courts exclusive in civil admiralty proceedings *in rem*, the states are powerless to grant their own courts jurisdiction of such proceedings. *The Moses Taylor*, 71 U.S. 411 (1866). Similarly, a state arbitration statute may not validly be applied by a state court to enjoin enforcement of an arbitration provision of a maritime contract on grounds of time bar, since such provisions are governed by the Federal Arbitration Act,<sup>23</sup> whereunder an issue of timeliness must be decided by the arbitrators. *Matter of A/S Ludwig Mowinckels Rederi and Dow Chemical Co.*, 25 N.Y. 2d 576 (1970).

State legislation in the maritime area is constitutionally permissible only if it is not hostile "to the characteristic features of the maritime law or inconsistent with federal

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<sup>21</sup> Article VI, Clause 2.

<sup>22</sup> 1 Stat. 76-66.

<sup>23</sup> 9 U.S.C. §§ 1-208.

legislation". *Just v. Chambers*, 312 U.S. 383 (1941), quoted with approval in *Askew v. American Waterways Operators, Inc.*, *supra*.

As Justice Frankfurter stated in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system."

Even in an area of purely "local concern",<sup>24</sup> wherein national uniformity is *not* mandated, state legislation will be immediately preempted once Congress enacts federal legislation covering the same area. Thus, since there was no federal legislation governing maritime liens for necessities furnished to vessels in their home ports before 1910, and since the matter was *not* considered one requiring national uniformity, state legislation creating maritime liens on domestic vessels for necessities so furnished was upheld. *The Orleans*, 36 U.S. 175 (1837). But in 1910, Congress enacted the first Federal Maritime Lien Act,<sup>25</sup> thus preempting the field, and thereafter all state maritime lien statutes were immediately invalidated to the extent they related to necessities covered by the Federal Act. *Piedmont, etc. Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 11 (1920); *Damps. Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940).

Nothing said in either *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, *supra*, or *Askev v. American Waterways Operators, Inc.*, *supra*, alters these fundamental rules. As

<sup>24</sup> While at a very early stage this Court had upheld state legislation in maritime areas wherein it did not consider national uniformity essential, the term "local concern" appears to have been employed by the Court for the first time in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

<sup>25</sup> See 46 U.S.C. § 971.

stated by Justice Black, writing for a majority of five justices in *Wilburn*:

Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one? (348 U.S. at 314).

Justice Black answered both of these questions in the negative.

Justice Frankfurter, concurring in the result, thought the majority opinion was based on grounds much too broad. He said the "question, and only question to be decided [was] whether the demands of uniformity relevant to maritime law require that marine insurance on a houseboat yacht brought to Lake Texoma for private recreation should be subject to the same rules of law as marine insurance on a houseboat yacht 'confined', after arrival, to the waters of Lake Tahoe or Lake Champlain."

Justice Reed, joined by Justice Burton in a dissenting opinion, disagreed with the majority on both counts; in his view, there *was* a clearly defined rule of maritime law governing marine insurance warranties, but even if none existed, it would be for this Court, rather than the state

legislatures, to fashion such a rule. In referring to the Admiralty Clause, he said:

Although congressional authority over maritime trade was not expressly granted by the Constitution, the grant of admiralty jurisdiction together with the Necessary and Proper Clause has been found adequate to enable Congress to declare the prevailing maritime law for navigable waters throughout the Nation. The Commerce Clause aids where interstate commerce is affected, but has not the scope of 'navigable waters'. \* \* \* (348 U.S. at 329).

\* \* \* State power may be exercised where it is complementary to the general admiralty law. It may not be exercised where it would have the effect of harming any necessary or desirable uniformity. \* \* \* The cases decided by this Court make it plain that state legislation will not be permitted to burden maritime commerce with variable rules of law that destroy that uniformity. \* \* \*

\* \* \*

*It is not only in markings, lights, signals, and navigation that States are barred from legislation interfering with maritime operation.* \* \* \* If uniformity is needed anywhere, it is needed in marine insurance. *It is like the question of seaworthiness which must be controlled by one law.* (348 U.S. at 332-333).

It will thus be seen that all three opinions in *Wilburn Boat* majority, concurring and dissenting—recognized three fundamental principles:

(1) No state maritime legislation is constitutional if it contravenes a judicially established rule of the general maritime law;

~

(2) Where there is neither federal legislation nor a judicially established rule of the general maritime law governing a particular area, this Court may fashion such a rule, and will do so if it considers the area one wherein national uniformity is desirable, whereupon any conflicting state legislation will be superseded;

(3) No state maritime legislation is constitutional in an area which has been preempted by federal legislation.

The *Wilburn Boat* Court divided, *not* on any of these three principles, but on the application of the first and second to the particular problem before it. There was no division with respect to the third principle; all eight justices who heard the case agreed that Congress had the power to regulate marine insurance warranties, and that if it had done so, the state statute would have been invalid insofar as it concerned such warranties.

In *Askew v. American Waterways Operators, Inc.*, *supra*, involving the constitutionality of the Florida Oil Spill Prevention and Pollution Control Act,<sup>26</sup> it was not argued that Congress had preempted the area of civil liability for oil pollution damage. The Federal Water Quality Improvement Act ("W.Q.I.A."),<sup>27</sup> (since superseded by the 1972 Water Pollution Control Act Amendments),<sup>28</sup> imposed penalties for discharges of oil and civil liability for removal costs incurred by the Government, but neither that Act nor any other federal legislation was concerned

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<sup>26</sup> Ch. 70-224, Laws of Florida, 1970, Ch. 376, Fla. Stat. Ann. (1973), as amended 26 Fla. Stat. Ann. §§ 376.011-376.21 (Supp. 1977).

<sup>27</sup> 84 Stat. 91-107, as amended 33 U.S.C. §§ 1251-1376.

<sup>28</sup> 33 U.S.C. §§ 1251-1376.

with liability for shoreside damage caused by discharges of oil from vessels. The three-judge court that had invalidated the Florida statute in *Askew* did so, not on the ground of preemption, but because, in the court's view, the statute was an invasion of an area of maritime law wherein the Constitution required national uniformity and harmony. See *American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241 (M.D.Fla. 1971).

In holding that in the absence of federal legislation regulating liability for pollution damage to shoreside property a state may validly regulate it, Justice Douglas appears to have treated such liability as a matter of "local concern", since he quoted with approval from *Just v. Chambers, supra*, holding that a state may modify or supplement the maritime law *provided the state legislation is not hostile "to the characteristic features of the maritime law or inconsistent with federal legislation."*

Thus, in *Askew*, this Court upheld the Florida statute (1) because there was no federal legislation regulating the liability which it imposed, and (2) in the Court's view, the state legislation before it was *not* hostile to the characteristic features of the maritime law. In reaching this second conclusion, the Court evidently concluded that lower federal court decisions<sup>29</sup> imposing liability for oil pollution damage did not constitute a sufficiently well established body of federal decisional law to preclude application of state legislation regulating such liability.

In *Askew*, the State authorities interpreted the Florida Act as imposing liability for pollution damage without

<sup>29</sup> See *Fireman's Fund Ins. Co. v. Standard Oil Co.*, 339 F.2d 148 (9th Cir. 1964); *In re New Jersey Barging Corp.*, 168 F. Supp. 925 (S.D.N.Y. 1958); *State of California v. The Bournemouth*, 307 F. Supp. 922 (C.D. Cal. 1969); *Salaky v. Atlas Barge No. 3*, 208 F.2d 174 (2d Cir. 1953); *Sweeney, Oil Pollution of the Oceans*, 37 Ford. L. Rev. 155, 168-81 (1968).

limitation as to amount, and urged this Court to overrule *Richardson v. Harmon*, 222 U.S. 96 (1911), which held the Federal Limitation of Liability Act<sup>30</sup> applicable to damage caused by vessels to shoreside property.<sup>31</sup> But this Court found it unnecessary to construe the statute insofar as limitation of liability was concerned. Justice Douglas stated:

The Solicitor General [of the United States, *amicus curiae*] says that while the Limited Liability Act, *so far as vessels are concerned*,<sup>32</sup> would override § 12 of the Florida Act by reason of the Supremacy Clause, the Limited Liability Act has no bearing on "facilities" regulated by the Florida Act. Moreover, § 12 has not yet been construed by the Florida courts and it is susceptible of an interpretation *so far as vessels are concerned* which would be in harmony with the Federal Act. Section 12 does not *in terms*<sup>33</sup> provide for unlimited liability. (411 U.S. at 331)

The provisions of the Florida statute in *Askew* most closely resembling those of the Washington Tanker Law were those requiring the installation of State-approved "containment gear" on vessels using Florida ports and the manning of such vessels with crews trained in the use of such gear.<sup>34</sup> Up to the time *Askew* was decided the Florida authorities had not issued the regulations authorized by the statutory provisions, and this Court therefore

<sup>30</sup> 46 U.S.C. §§ 183-189.

<sup>31</sup> Brief of Appellants *Askew et al.*, pp. 65-69.

<sup>32</sup> Emphasis is the Court's.

<sup>33</sup> Emphasis is the Court's.

<sup>34</sup> Sec. 7, Laws of Florida, 1970, Ch. 376, Fla. Stat. Ann. (1973), as amended 26 Fla. Stat. Ann. §§ 376.011-376.21 (Supp. 1977).

specifically declined to pass upon the constitutionality of those provisions. In this connection Justice Douglas stated:

Nor can we say at this point that regulations of the Florida Department of Natural Resources requiring "containment gear" pursuant to § 7(2) (a) of the Florida Act would be *per se* invalid because the subject to be regulated requires uniform federal regulation. Cf. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). Resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations promulgated on December 21, 1972, pursuant to § 1161(j) (1) of the Federal Act, 37 CFR § 28250, should await a concrete dispute under applicable Florida regulations. (411 U.S. at 336-337).

*Askew*, like *Wilburn Boat*, *supra*, thus restates the rule that state laws and regulations are invalid if they conflict with federal laws or regulations.

It is significant that the Florida statute upheld in *Askew* proved to be unworkable; shipowners generally were unable to comply with its insurance requirements and in some instances cargoes had to be discharged at ports in neighboring states and trucked to Florida. The statute was therefore drastically amended in 1974, and its most burdensome features, including its insurance and unlimited liability provisions, were deleted.<sup>36</sup>

Appellants' arguments that the states are more familiar with local navigational problems than the federal Government and therefore better equipped to cope with them will not bear scrutiny. The federal authorities of course

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<sup>36</sup> See Pollutant Spill Prevention and Control Act, 26 Fla. Stat. Ann. §§ 376.011-376.21 (Supp. 1977), amending Ch. 376, Fla. Stat. Ann. (1973).

take local conditions into account. Thus, while pilots on vessels engaged in coastwise trading must be federally licensed, a prospective pilot must pass an examination concerning the problems of navigation in the particular port or waterway for which he seeks a license. The Coast Guard is not confined to an office in Washington, D.C., but has a Captain of the Port stationed in each of the major port cities. While the navigational laws and regulations are federal, special rules apply in particular areas, *e.g.*, the Great Lakes<sup>38</sup> and the Mississippi and its tributaries.<sup>37</sup> The Coast Guard has a long history of close cooperation with State authorities in solving maritime problems of a local nature. Moreover, the Coast Guard and other federal agencies are able to draw on experience acquired in one area in formulating rules to be applied in another with similar problems. The authorities of the several states cannot possibly acquire similar experience, as their activities must necessarily be confined to their own waters. Its experience has given the Coast Guard an unsurpassed expertise in vessel design and construction, and in oil pollution prevention and control.

In the Association's view, therefore, the Washington Tanker Law is not only invalid but unwise. The environmental problems it seeks to minimize can best be dealt with by the national Government, as the Constitution itself mandates.

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<sup>38</sup> 33 U.S.C. §§ 241-295; 33 C.F.R. §§ 90.01-90.30.

<sup>37</sup> 33 U.S.C. §§ 301-356; 33 C.F.R. §§ 95.01-95.80.

**CONCLUSION**

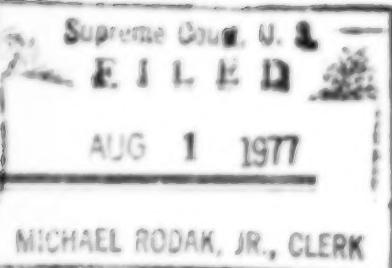
The judgment of the District Court declaring the Washington State Tanker Law unconstitutional should be affirmed, and the stay of its order permanently enjoining enforcement of the law should be vacated.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

No. 76-930

DIXY LEE RAY, GOVERNOR OF THE STATE OF  
WASHINGTON, ET AL., *Appellants*,

v.

ATLANTIC RICHFIELD CO., ET AL., *Appellees*.

On Appeal from the United States District Court for the  
Western District of Washington

BRIEF FOR THE AMERICAN INSTITUTE OF  
MERCHANT SHIPPING AS AMICUS CURIAE

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IN THE

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**DIXY LEE RAY, GOVERNOR OF THE STATE OF  
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**BRIEF FOR THE AMERICAN INSTITUTE OF  
MERCHANT SHIPPING AS AMICUS CURIAE**

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**INTEREST OF AMICUS CURIAE**

The American Institute of Merchant Shipping (hereinafter "AIMS") has obtained and filed with the Clerk the consent of all parties to the filing of this brief.

AIMS is a non-profit association organized under the laws of the District of Columbia. Its membership includes 34 United States companies which operate over 340 ships, in the foreign, coastal and intercoastal trades, representing about 70 percent of all active privately-owned tonnage registered under the United States flag.

AIMS has played an active role in the development of international, national, and local rules affecting vessel operation, safety and pollution prevention. Maritime commerce is essentially a multinational activity, occurring predominantly in international waters. AIMS has, therefore, stressed the need to avoid the Balkanization of vessel regulation, which could substantially impair the free flow of commerce and make more difficult the achievement of safety and environmental goals that are dependent on international cooperation. AIMS has strongly supported the efforts of the Federal Government to establish uniform national regulations governing vessel operation which would be compatible with international conventions. During Congressional hearings on the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227 and 46 U.S.C. § 391a (Supp. V 1975), AIMS testified in favor of exclusive Federal regulation of vessel operations.<sup>1</sup>

The State of Washington, however, has enacted legislation which severely restricts the operation of vessels in the Puget Sound area. This legislation, although enacted for the commendable purpose of reducing oil

pollution in Washington State waters, will conflict with the Federal Government's development and implementation of a uniform system of national regulation. Practices established by local jurisdictions are likely to be out of harmony with each other and would tend to foreclose options for Federal regulation, particularly if, as in the present case, they relate to vessel construction. Without Federal preemption in the area of vessel operation and design, the maritime industry would be faced with the prospect of uncontrolled proliferation of statutes similar to that enacted by Washington, raising not only the specter of mutual incompatibility but also the likelihood of severe restrictions on the efficient use of costly assets.

AIMS, therefore, files this *amicus* brief to urge that the Federal preeminence in the area of maritime commerce, especially as concerns vessel construction and operation, be upheld. The judgment of the District Court overturning the Washington State legislation should be affirmed.

#### QUESTIONS PRESENTED

1. Whether, where Congress has granted comprehensive authority to the Coast Guard to regulate oil tankers with respect to operation in port areas and with respect to construction and equipment standards, reserving to the states the right to prescribe higher standards for structures (but not for vessels), the State of Washington is precluded by the Supremacy Clause of the United States Constitution from enacting legislation regulating oil tanker operations in Puget Sound and imposing oil tanker design and equipment standards?

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<sup>1</sup> Hearings on H.R. 17830, H.R. 18047, H.R. 15710 before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries, 91st Cong., 2d Sess. 181-82 (1970).

2. Whether the Commerce Clause of the United States Constitution precludes the State of Washington from prohibiting certain vessels from using navigable waters of the United States to engage in interstate and foreign commerce and from placing discriminatory burdens on certain other vessels in interstate and foreign commerce unless those vessels comply with prescribed design and equipment standards?

3. Whether the foreign relations authority of the Federal Government restricts the State of Washington from imposing restrictions on the operation of oil tankers that are inconsistent with international standards?

#### **SUMMARY OF ARGUMENT**

The State of Washington has enacted legislation excluding from Puget Sound all oil tankers in excess of 125,000 deadweight tons and establishing minimum design and construction standards for oil tankers between 40,000 and 125,000 deadweight tons. If a tanker in this size range does not comply with the minimum requirements, it must employ tug escorts while navigating the waters of Puget Sound. Washington has justified these restrictions on the grounds that they are necessary to protect Puget Sound from oil pollution casualties.

#### **I**

A. The Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227, 46 U.S.C. § 391a (Supp. V 1975), which authorizes the Coast Guard to regulate vessel operations in port areas and to impose design and equipment standards for oil tankers, contains express

language indicating that the scheme of vessel regulation established by Federal law was to be exclusive. The Washington legislation is invalid because it occupies the same area covered by the Ports and Waterways Safety Act of 1972 and thus directly interferes with the exclusive Federal system of regulation.

1. Congress provided, in Section 102(b) of the Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1222(b), that states could prescribe standards higher than those set by the Federal Government with respect to "structures only," intentionally excluding a grant of authority to the states to regulate vessels. The legislative history of that provision includes a statement that Section 102(b) was intended to preempt the area of vessel regulation and that "state regulation of vessels is not contemplated." H.R. REP. No. 92-563, 92d Cong., 1st Sess. (1971) at 15. As a consequence, Washington is precluded from imposing limitations on the entry of oil tankers into Puget Sound.

2. Title II of the Ports and Waterways Safety Act of 1972 authorizes the Coast Guard, in consultation with the Maritime Administration and the Environmental Protection Agency, to promulgate design and equipment standards. Section 201, 49 U.S.C. § 391a(3), (4). Title II makes no reference to any state participation in this area. Exclusion of state action in this area is consistent with decisions by this Court, which, although recognizing some state authority over vessels in interstate and foreign commerce, have uniformly refrained from sanctioning local imposition of design and equipment standards. See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Kelly v. Washington*, 302 U.S. 1

(1937). As a consequence, Washington is precluded from imposing limitations on oil tanker operations based on design or equipment standards.

3. Under the Ports and Waterways Safety Act of 1972, the Coast Guard has been authorized to establish comprehensive rules and regulations for the movement of oil tankers in United States port areas, to limit the size of vessels entering port areas where hazardous conditions so require, to restrict vessel operations in port areas under hazardous circumstances to those having certain operating characteristics and capabilities and to establish design and equipment standards for all vessels entering United States waters. The Coast Guard is directed to use its authority with the specific objective of protecting navigable waters and resources therein from environmental harm. 33 U.S.C. § 1221, 46 U.S.C. § 391a(1). Under this authority, the Coast Guard has promulgated specific rules for Puget Sound, 33 C.F.R. Part 161, Subpart B, and has promulgated design and equipment requirements under 33 C.F.R. Part 157 amended at 41 Fed. Reg. 54177, December 3, 1976. Thus, the Federal scheme fully covers the areas attempted to be regulated by the State of Washington.

B. The Federal Government has preeminent responsibility for maritime matters, and states are not permitted to enact legislation in this area unless Congress has expressly or by implication indicated its willingness to allow state action in a particular area. Where states have acted to control the so-called local aspects of maritime law, their action has been premised on the existence of statutory authority, or, in the absence of express statutory authority, the lack of any Federal legislation governing the area and a determination that the local regulation would not interfere with areas

requiring uniformity. *Kelly v. Washington*, 302 U.S. 1 (1937). In the present case, Congress has enacted legislation in the area under consideration, which recognizes the desirability of uniform regulation of oil tanker operations and construction and design standards, thus precluding state legislation in this area.

## II

Washington's legislation is invalid under the Commerce Clause of the United States Constitution because it applies primarily and specifically to instrumentalities of interstate and foreign commerce and as a consequence cannot be regarded as a local measure. The Washington legislation imposes significant economic burdens on the transportation of oil into the Puget Sound area. This burden, which has an annual cost in the millions of dollars, cannot be minimized by describing it as merely a few cents per barrel of oil transported. Finally, the areas of vessel design and construction and the regulation of vessel operation require a uniformity throughout the United States and, if possible, throughout the world. Such uniformity can only be achieved through regulation at the national level and through international agreement implemented by the Federal Government.

## III

The Washington legislation is also a severe infringement upon the power of the Federal Government to conduct foreign affairs of the United States. The United States has actively and aggressively sought to develop international standards that would protect the world's ocean from the harmful effect of oil pollution. One of the more recent results of this effort has been the conclusion of an international agreement at

the end of 1973 establishing international standards for vessel operation and for vessel design and equipment, that are similar to those contemplated under the Federal Ports and Waterways Safety Act of 1972. President Carter on March 22, 1977, submitted this convention to the Senate for Advice and Consent. Action by the State of Washington to impose standards that are inconsistent with the provisions of this convention will undermine the efficacy of international solutions to the detriment of the general interest of the United States.

For all of the above reasons, the judgment of the District Court that the Washington legislation is invalid should be affirmed.

#### ARGUMENT

##### I. WASHINGTON IS PRECLUDED FROM ENACTING LEGISLATION IMPOSING DESIGN AND CONSTRUCTION STANDARDS AND LIMITING THE OPERATIONS OF OIL TANKERS IN PUGET SOUND BECAUSE THESE MATTERS ARE COVERED BY COMPREHENSIVE FEDERAL LEGISLATION WHICH WAS INTENDED BY CONGRESS TO BE EXCLUSIVE.

The focus of this case is Chapter 125, Laws of the State of Washington, 1975, First Extraordinary Session, Codified at Wash. Rev. Code §§ 88.16.170-190 (Supp. 1976) ("Tanker Law"), which (1) completely excludes approximately 60 per cent of the existing tonnage of the world's tanker fleet—tankers exceeding 125,000 dwt—from Puget Sound (A.58, ¶52),<sup>2</sup> and (2) requires those between 40,000 and 125,000 dwt to employ a battery of tug escorts while in Puget Sound,

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<sup>2</sup> References to "A." are to the appendix filed with the Appellant's brief.

unless they comply with stringent statutory construction and equipment requirements and any additional such requirements that may be imposed by regulation (A.43, ¶ 10). The State of Washington maintains that these restrictions are necessary to protect Puget Sound from the irreparable harm of oil pollution.

Examination of the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227, 46 U.S.C. § 391a (Supp. V 1975), demonstrates that Congress intended to preclude states from enacting legislation such as the Washington Tanker Law and that Congress intended that the regulation of oil tankers in port areas and the imposition of design and construction standards be within the exclusive authority of the Federal Government, particularly the Coast Guard.

##### A. The Intent of Congress That Federal Regulations Be Exclusive Is Evident from the Language and Legislative History of the Ports and Waterways Safety Act of 1972.

1. Section 102(b) of the Ports and Waterways Safety Act of 1972 authorizes the Coast Guard to exercise exclusive control over oil tanker operations in Puget Sound and precludes state regulation in this area.

The intention of Congress to preempt state action with respect to matters covered by the Ports and Waterways Safety Act of 1972 is evident in both the language of the statute and its legislative history. Title I, which provides the broad authority for the Coast Guard to control oil tanker operations in United States port areas, limits the area of permitted state action to prescription of higher standards for structures but not for vessels. Section 102(b) provides:

- (b) Nothing contained in this title . . . prevent[s] a State or political subdivision thereof

from prescribing *for structures only* higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title. 33 U.S.C. § 1222(b). (Emphasis added).

Title I authorizes regulation both of shore-based structures and vessels, and Section 102(b) is a clear statement that the vessel portion of Title I is reserved to the Federal Government. The legislative history of this provision confirms this conclusion. The House Report contains the following statement on the reasons for including Section 102(b):

This amendment was suggested since it was felt that H.R. 8140 does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. The inserted language is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated. H.R. REP. No. 92-563, 92d Cong. 1st Sess. at 15 (1971).

The preemptive language in Section 102(b) of Title I precludes the State of Washington from asserting that cases such as *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829), and *Cooley v. Board of Wardens*, 12 How. 299 (1851), authorize the establishment of State regulation of vessels with respect to matters covered by the Port and Waterways Safety Act of 1972. Section 102(b) makes it clear that regulation of oil tankers for the purpose of preventing pollution is not a local matter and makes it unnecessary for this Court to fashion a boundary between local and national authority in this case, since that line has been expressly drawn by Congress.

2. The provisions of the Ports and Waterways Safety Act of 1972 authorizing the imposition of design and equipment standards provide no authority for independent or supplemental state action.

Title II of the Ports and Waterways Safety Act of 1972 authorizes the Coast Guard, in consultation with the Maritime Administration and the Environmental Protection Agency, to establish design and equipment standards for oil tankers. 46 U.S.C. § 391a(3), (4). No provision is made for state action in this area.

As a general principle, any state regulation of physical configuration that prevents the free movement of interstate and foreign commerce is barred by the Commerce Clause. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). In the maritime area this Court, in reviewing the right of individual states to regulate the operation of vessels engaged in foreign and interstate commerce, has clearly indicated that the right of regulation does not extend to construction requirements.

In *Kelly v. Washington*, 302 U.S. 1 (1937), the imposition of safety regulations on tugboats operating in the waters of the State of Washington was permitted because Federal law did not apply to those vessels. With respect to construction requirements, this Court added:

For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. 301 U.S. 1, 14-15.

In *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the application of an air pollution ordinance to vessels docked in the jurisdiction of Detroit was upheld. The Detroit Smoke Abatement Code did not impose any specific structural requirements but only required that smoke emitted from the vessels' boilers not exceed in density or duration the maximum standards allowable under the Detroit Smoke Abatement Code. *Id.* at 441.

In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), state laws regarding oil pollution liability were sustained. The statute in question also contained a requirement for "containment gear." This Court, although deferring consideration of the legality of this requirement until an actual dispute arose, indicated that such a requirement could be "*per se* invalid because the subject to be regulated requires uniform federal regulation." 411 U.S. 325, 337.

In light of the well established principle that imposition of design and equipment standards for vessels is outside the constitutional authority of individual states, state action in this area can only be justified if expressly provided for in Title II. Title II contains no such provision, and consequently those portions of the Washington Tanker Law that impose limitations on oil tankers based on design and equipment standards are invalid.

**3. The Ports and Waterways Safety Act of 1972 provides broad authority to regulate oil tanker operation in port areas and to impose design and equipment standards, expressly covering the areas regulated by the Washington Tanker Law.**

The Ports and Waterways Safety Act of 1972 expressly confers upon the Coast Guard the responsibil-

ity for regulating all aspects of oil tanker operation in port areas that relate to environmental hazards such as oil pollution.

In carrying out its responsibility for environmental protection, the Coast Guard is authorized under Title I of the Ports and Waterways Safety Act of 1972 to:

- (1) establish, operate, and maintain vessel traffic services and systems for ports, harbors, and other waters subject to congested vessel traffic;
- (2) require vessels which operate in an area of a vessel traffic service or system to utilize or comply with that service or system, including the carrying or installation of electronic or other devices necessary for the use of the service or system;
- (3) control vessel traffic in areas which [is determined] to be especially hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by—
  - (i) specifying times of entry, movement, or departure to, from, within, or through ports, harbors, or other waters;
  - (ii) establishing vessel traffic routing schemes;
  - (iii) establishing vessel size and speed limitations and vessel operating conditions; and
  - (iv) restricting vessel operation, in a hazardous area or under hazardous conditions, to vessels which have particular operating characteristics and capabilities which [is considered] necessary for safe operation under the circumstances;
- (4) direct the anchoring, mooring, or movement of a vessel when necessary to prevent damage to

or by that vessel or her cargo, stores, supplies, or fuel;

(5) require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved, . . . . 33 U.S.C. § 1221 (Supp. V 1975).

Under Title I, the Coast Guard can exclude an oil tanker from areas such as Puget Sound if safety or environmental conditions require and the Coast Guard officer serving as Captain of the Port has been authorized to exercise this authority (33 C.F.R. Part 160). Title I also expressly authorizes the Coast Guard to limit operations in areas such as Puget Sound to those oil tankers that have particular characteristics and capabilities when there are hazardous circumstances. This authority would include the imposition of tug escorts where deemed necessary.

Thus, Title I of the Ports and Waterways Safety Act of 1972 confers on the Coast Guard responsibility for determining whether and under what circumstances an oil tanker can enter a United States port and authority for controlling the navigation of oil tankers in port areas. Pursuant to this authority, the Coast Guard has adopted a specific plan for the Puget Sound area. 33 C.F.R. Part 161, Subpart B.

In addition to its authority to regulate the operation of oil tankers in port areas, the Coast Guard has broad general authority under Title II of the Ports and

Waterways Safety Act of 1972 to prescribe design and construction standards for oil tankers.<sup>3</sup>

Title II authorizes the Coast Guard to impose on oil tankers any and all of the design and equipment requirements found in the Washington Tanker Law. The Coast Guard has exercised this authority by establishing design and equipment standards for vessels carrying oil in the domestic trade, 33 C.F.R. Part 157, and

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<sup>3</sup> The pertinent provisions of the Act are as follows:

a) In order to secure effective provisions (A) for vessel safety, and (B) for protection of the marine environment [the Coast Guard] shall establish for the vessels to which this section applies such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; . . . . In establishing such rules and regulations the Secretary shall, after consultation with the Secretary of Commerce and the Administrator of the Environmental Protection Agency, identify those established for protection of the marine environment and those established for vessel safety. 46 U.S.C. § 391a (3) (Supp. V 1975).

• • •

b) Before any rules or regulations, or any alteration, amendment, or repeal thereof, are approved by the Secretary under the provisions of this section, except in an emergency, the Secretary shall (A) consult with other appropriate Federal departments and agencies, and particularly with the Administrator of the Environmental Protection Agency and the Secretary of Commerce, with regard to all rules and regulations for the protection of the marine environment, (B) publish proposed rules and regulations, and (C) permit interested persons an opportunity for hearing. In prescribing rules or regulations, the Secretary shall consider, among other things, (i) the need for such rules or regulations, (ii) the extent to which such rules or regulations will contribute to safety or protection of the marine environment, and (iii) the practicability of compliance therewith, including cost and technical feasibility. 46 U.S.C. 391a(4) (Supp. V 1975).

has recently proposed expanding these regulations to require segregated ballast tanks and, for new buildings, double bottoms for all oil tankers in excess of 20,000 dwt calling at United States ports. 42 Fed. Reg. 24868, May 16, 1977. It is important to note that under Title II, these design and equipment regulations can be imposed only after consultation with the Commerce Department (which contains the Maritime Administration) and the Environmental Protection Agency and after taking into account factors relating to efficacy, cost and technical feasibility. 46 U.S.C. § 391a(3), (4). This coordination requirement demonstrates that Congress intended that the synthesizing of competing policy considerations and the determinations of technical matters be carried out at the national level.

The comprehensive nature of the Ports and Waterways Safety Act of 1972 further evidences the intent of the Congress to preempt state regulation. As outlined above, the Ports and Waterways Safety Act of 1972 confers broad authority upon the Coast Guard to establish a comprehensive Federal regulatory system governing oil tanker operations and design, specifically focusing on the elimination of oil pollution and other environmental hazards. The Coast Guard has in fact developed regulations to control oil tanker navigation in United States port areas such as Puget Sound, 33 C.F.R. Part 161, Subpart B, and to regulate oil tanker design and equipment. 33 C.F.R. Part 157. Under this scheme, there is no room for independent action by the State of Washington relating to these same areas.

The structure and legislative history of the Ports and Waterways Safety Act of 1972 indicate that Congress intended to establish a uniform and national system of regulation. Where such intent is clear, action by the

State of Washington in the same area is not permitted. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). Where the Congress has taken such preemptive action, it is not necessary to examine state legislation to determine whether there is a direct conflict. Whether or not a conflict now exists, state legislation in an area preempted by Federal action is an impermissible intrusion. The principle that a state law is valid unless it directly conflicts with a Federal law is only applicable where Congress has not acted to foreclose state activity in the area. See *Douglas v. Seacoast Products*, Slip op. (May 23, 1977); *Rath v. Jones*, Slip op. (March 29, 1977).

**B. The Federal Government Has Preeminent Authority over Maritime Regulation and the State of Washington May Not Regulate this Area Absent Express or Implied Federal Consent.**

The preeminent authority of the Federal Government to regulate maritime matters is constitutional, flowing from the Commerce Clause, Article I, § 8, Clause 3, *Gibbons v. Ogden*, 9 Wheat. 1 (1824), and the grant of the admiralty and maritime jurisdiction to the Federal courts, Article III, § 2. *Ex Parte Garrett*, 141 U.S. 1, 14 (1891). The preeminent Federal authority is necessary to maintain the uniformity of the maritime law. State and local legislation that would undermine this uniformity has been invalidated on many occasions. See, e.g., *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 219 (1917); *Workman v. City of New York*, 179 U.S. 552 (1900); *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527 (1889).

Although *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), has qualified the principle of *Southern Pacific v. Jensen, supra*, that Federal authority over all maritime matters is exclusive, Federal authority over the regulation of vessel operation, design and equipment is still paramount. *Askew* indicated that *Jensen* should not be read to prevent states from enacting legislation relating to damages that occur to the territory of a state, but expressly recognized the continued exclusivity of Federal jurisdiction with respect to those aspects relating to vessels plying the high seas and United States navigable waters. *Id.* at 344.

Although the broad structure of the maritime law must be national, Congress has on occasion recognized the need for local regulation of some matters affecting maritime commerce and navigation. But when Congress has considered that local regulation was appropriate, the legislation enacted by Congress has included an express provision for such local regulation.

Such express Congressional allocation of authority for specific admiralty and maritime matters dates from the first days of our government. During its first session, Congress authorized local regulation of pilotage in the bays, rivers, and ports of the United States on a temporary basis "until further legislative provisions are made by Congress." An Act of Congress, August 7, 1789, Ch. 9, § 4, 1 Stat. 54 (current version at 46 U.S.C. § 211 (1970)). This assignment of a maritime responsibility to the states was upheld against the challenge that it was beyond the authority of the Federal Government to delegate and that it violated the Commerce Clause. *Cooley v. Board of Wardens, supra*. Subsequent Congressional legislation has returned much of this regulatory authority to the

Federal Government, Act of Feb. 28, 1871, Ch. 100, § 51, 16 Stat. 455, 46 U.S.C. §§ 215, 364 (1970), leaving to the states control only over pilots for registered vessels (vessels engaged in foreign commerce). *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187 (1912).

At that same first session, Section 9 of the Judiciary Act of 1789, providing for the exclusive admiralty and maritime jurisdiction in the Federal district courts, saved to all suitors their common law remedies. 1 Stat. 76-77 (1789) (current version at 28 U.S.C. § 1333 (1970)). Under this savings clause, a state legislature can add to the body of remedies available through statutory enactments. *Old Dominion Steamship Co. v. Gilmore*, 207 U.S. 398 (1907); *American Steamboat Company v. Chace*, 16 Wall. 522, 533-34 (1873).

Even in the environmental area, the Congress has continued this pattern of specific delegation of authority for state regulation affecting maritime commerce. The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. V 1975), provides for state participation in the development of a comprehensive pollution prevention program, 33 U.S.C. § 1252, and in the implementation of those programs, 33 U.S.C. §§ 1254-1265. That legislation also provides for recovery of oil pollution damages incurred by the Federal Government, but leaves to the states the development of the legal rules governing damages to the interests of the states or their residents, 33 U.S.C. § 1321(o)(2). Because of the express statutory acknowledgement of state authority, this Court upheld the State of Florida's oil pollution liability law, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), recognizing there, as in the saving-to-suitors clause, the

right of states to add to the remedies available under the maritime law where Congress's intent that they do so was manifest.

The Estuarine Act of 1968 recognizes state jurisdiction over hunting and fishing laws and regulations, 16 U.S.C. §§ 1221-1226 (1970), and the Deepwater Ports Act of 1974 provides for state authority to impose additional liability for any discharge of oil from a deepwater port or a vessel within any safety zone. 33 U.S.C. § 1517(k) (Supp. V 1975). None of the above delegations to the states included the authority to regulate vessel operation or design.

In making these allocations to the states of regulatory authority in the maritime area, Congress has made specific determinations that there is a need for local participation in a particular area. In the Ports and Waterways Safety Act of 1972, however, there is no provision authorizing state regulation of oil tankers. By not providing for state regulation, the Congress has retained this area of maritime regulation within the exclusive domain of the Federal Government.

Although there have been cases where local regulation of matters affecting maritime law and maritime commerce has been sustained even though there has been no express delegation by Congress in the area, these cases are limited to regulations that are within the traditional authority of local jurisdictions and that would not have an adverse impact on the uniformity of the maritime law. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Just v. Chambers*, 312 U.S. 383, 389-90 (1941); *Kelly v. Washington*, 302 U.S. 1 (1937); *City of Norwalk*, 55 F. 98, 107-08 (1893). The silence of Congress in not enacting legislation in a particular area may be construed as an implied consent for

local regulation in that area. *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 313-14 (1955). But for a state to rely on the implied consent or acquiescence of Congress, it must show that there has been no Federal legislation in the area and that the state's action would not disrupt those portions of the maritime law requiring uniform rules.

*Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), represents a blending of these principles. In that case this Court relied on the express Congressional recognition of local responsibility for air pollution control coupled with the absence of any air pollution control provisions in the Federal legislation providing for vessel inspection. *Id.* at 445-446.

In this case, the State of Washington is not justified in claiming a right to regulate vessel operation and impose construction and design standards on the basis of the police power. First, Congress has enacted legislation in this area which expressly limits the role of the states to providing higher standards for structures only.<sup>4</sup> Second, by establishing a comprehensive system of vessel regulation for the purpose of preventing environmental damage and by excluding from that system any authority for local jurisdictions to supplement it, Congress has reserved to the Federal Government the exclusive authority to regulate in this area. Third, even if this area were not expressly reserved to the Federal Government, the need to have uniformity in

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<sup>4</sup> The Ports and Waterways Safety Act of 1972 contains language acknowledging that some localities had imposed local rules relating to port operation prior to the enactment of Federal legislation in the area. 33 U.S.C. § 1222(e)(6). It was expressly intended that these local systems give way to the new system designed by the Coast Guard. 33 U.S.C. § 1222(b).

vessel design and construction standards would prohibit local jurisdictions from enforcing legislation of that nature.

The assertion of police power authority to protect the environment cannot expand the limited scope of state authority to regulate maritime matters in an area covered by Federal legislation. As this Court has recently noted, a state cannot escape the Constitutional and statutory limitations on its authority "by cloaking objectionable legislation in the currently fashionable garb of environmental protection." *Douglas v. Seacoast Products, Inc.*, Slip op., at 19 n. 21 (May 23, 1977).

## II. THE WASHINGTON TANKER LAW IMPOSES AN UNCONSTITUTIONAL BURDEN ON INTERSTATE AND FOREIGN COMMERCE BY EXCLUDING CERTAIN VESSELS FROM PUGET SOUND AND BY IMPOSING UNJUSTIFIED AND DISCRIMINATORY CONDITIONS ON THE ENTRY OF CERTAIN OTHER VESSELS INTO PUGET SOUND.

Should this Court find that the Washington Tanker Law has not been preempted by the Ports and Waterways Safety Act of 1972, the Washington Tanker Law would nevertheless be invalid under the Commerce Clause of the United States Constitution.

This Court has consistently interpreted the Commerce Clause (Art. I, §8, Clause 3) as establishing in the Federal Government the plenary authority to regulate foreign and interstate commerce. This principle was initially elaborated in an opinion by Chief Justice Marshall, holding navigation to be encompassed in the commerce power. *Gibbons v. Ogden*, 9 Wheat. 1 (1824). It has been recognized that this broad power

in the Federal Government does not prevent a state from enacting regulations of a local nature, particularly where police functions relating to the health and safety of a state's citizens are concerned, even though such regulation may have some effect on navigation involving foreign and interstate commerce. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

However, to fall within this police power exception, it must be established (1) that the regulation is primarily local and only incidentally affects interstate and foreign commerce, (2) that the burden it places on interstate and foreign commerce is not significant, and (3) that there is no need for a uniform system of regulation in the area. The Washington Tanker Law fails to meet any one of these criteria, much less all three.

### A. The Tanker Law Has No Apparent Local Impact and Is Primarily and Specifically Designed to Regulate Foreign and Interstate Commerce.

Although this Court has permitted States to impose exclusionary regulations, it has done so only upon demonstration that such exclusions will have equal application to local interests. *South Carolina Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938). The mere fact that a state is attempting to protect local interests does not make regulations for that purpose local if its impact is solely, or even predominantly, on foreign and interstate commerce.

In *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), this Court upheld the application of a Detroit smoke control ordinance to a vessel engaged in interstate commerce. This is an example of a local regulation whose primary impact was to control emis-

sions from sources permanently located in Detroit. The application of these same standards to an emission source transiting Detroit's jurisdiction was incidental to the primary impact of the regulation.

The Washington Tanker Law, on the other hand, is expressly directed at vessels that are in interstate and foreign commerce, and there is no suggestion in the record that this law will affect any purely local transactions in the State of Washington. No showing of local applications can be made either with respect to the exclusion of tankers in excess of 125,000 dwt or to the requirement that vessels that do not meet certain design and equipment standards engage Washington-based tug operators. In fact, the statistics concerning the flow of oil in and out of Puget Sound indicate that the only impact will be on foreign and interstate commerce (A. 45-49, ¶¶ 16-22).

**B. The Tanker Law Places a Significant Burden On Interstate and Foreign Commerce by Restricting the Efficient Utilization of Oil Tankers in Excess of 125,000 Deadweight Tons and by Imposing Unnecessary Costs on Other Oil Tankers.**

Although the economic impact of the Washington Tanker Law cannot be precisely calculated, it is most misleading to measure the costs on the basis of additional expense per barrel of oil transported or as a percentage of the total cost of transportation. The relevant measure is the absolute costs of complying with the Washington Tanker Law and these costs are quite significant.

Each portion of the Washington Tanker Law has its own cost impact. The exclusion of oil tankers in

excess of 125,000 dwt increases the projected operating cost for tankers operating between Alaska and Washington by about \$3,000,000 per year by 1978 (based on \$.04 per barrel differential between a 120,000 dwt and a 150,000 dwt tanker (A. 64, ¶ 68) x 213,000 bpd (A. 49, ¶ 21) x 365 days).

The requirement to meet design and equipment standards could run to about \$8 or \$9 million per vessel (based on a tanker cost of \$80 million (A.55, ¶ 39) x an estimated cost increase of 11% (A.62, ¶ 63)).

The requirement that tugs be used in lieu of complying with the design and equipment standards has been estimated to cost in excess of a quarter of a million dollars per year just with respect to Atlantic Richfield (A.68, ¶ 78).

Thus, the aggregate cost of complying with the Washington Tanker Law is substantial and that cost is not in any way reduced merely by describing it as so many pennies per barrel of oil transported.

**C. Regulation of Tanker Construction and Equipment Requires Uniformity.**

Although Washington has tried to downplay the impact of the section of its Tanker Law that establishes design and equipment standards, that aspect of the law is inextricably linked with the requirement to employ tug escorts. By imposing economic penalties and operational limitations on oil tankers that do not meet prescribed design and equipment standards, Washington's Tanker Law is in effect regulating these areas. Such actions interfere with the development of uniform national and international standards.

The case for uniformity in design and construction requirements is evident. Oil tankers trade throughout the world. Since tankers are frequently chartered for only a single voyage at a time, they are invariably employed in many of the major tanker routes during their life span. This movement is similar to the interstate movement of tractor-trailers considered by this Court in *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). If every state, not to mention every port area such as Puget Sound, imposed its own design and construction standards, the flexibility in deployment of tankers would be seriously impaired. One can easily imagine a case where a vessel constructed to meet the criteria of one port would thereby automatically be excluded from another port. For example, under the Washington Tanker Law, a tanker between 40,000 and 125,000 dwt is required to have a double bottom, twin screws and shaft horsepower equal to one horsepower to each two-and-one-half dwt. If a vessel were built to these specifications, it would have no assurance that it could enter Alaskan waters, since legislation enacted by Alaska requires the use of tug escorts unless the vessel has lateral bow thrusters, redundant boilers and either controllable pitch propellers or a stern horsepower equal to 40% of forward horsepower. Alaska Tanker Law, Alaska Stat. § 30.20.020.<sup>5</sup>

The very different approaches reflected by Washington's Tanker Law and the Alaska Tanker Law is convincing evidence that states are unlikely to develop compatible systems of regulation.

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<sup>5</sup> The constitutionality of the Alaska law has not yet been challenged, but it appears that it is subject to the same objections as those raised in this challenge to the Washington Tanker Law.

Pollution prevention is a technically complex problem, encompassing the standard problems of navigation and, in addition, the special problems of oil carriage. The ballasting and de-ballasting operations create a problem of minor but regular oil discharges while the accidental grounding or collision creates the possibility of a concentrated discharge. Because of the technical complexities, there are differing opinions as to the most effective methods of reducing oil discharge. Imposition of pollution prevention measures will have an impact on energy consumption, human safety, and economic activity, and thus the adoption of a system of regulation will require the establishment of priorities. If coastal states are given a free rein to make technical determinations and to establish priorities, they are likely to impose incompatible construction and equipment requirements. Such a hodgepodge of regulation could easily operate to prohibit a tanker from serving more than one port and to increase the cost of construction and operation of tankers.

These inefficiencies involve costs that must be recognized and justified. These costs are more than mere numbers that appear on the financial statements of the tanker owners; they represent expenditures of valuable resources—energy, raw materials, labor and capital—and it is in the interest of all that these resources be used wisely. For this reason, mandatory construction and equipment standards should be established and implemented in an efficient manner. Where a uniform system of tanker regulation has been established by the Coast Guard under the Ports and Waterways Safety Act of 1972, multiple systems of state regulation are wasteful and undeniably contrary to the Constitutional

principles prohibiting the imposition of such burdens on foreign and interstate commerce.

The substantial inefficiencies created by the Washington Tanker Law are clearly seen when their impact is compared with two landmark cases involving the attempt of states to regulate physical configuration of equipment used in interstate transportation. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), the court struck down an Arizona law that prohibited trains in excess of 70 cars from transiting the state. The court noted such a limit would require the railroad to run additional trains through Arizona and that this was an impermissible burden for Arizona to place on the railroad. The impact of the Washington Tanker Law in excluding tankers in excess of 125,000 dwt is much more severe than the requirement that Southern Pacific uncouple a few cars and bring them through Arizona on another locomotive. It is impossible for a 190,000 dwt tanker to "uncouple" 65,000 dwt and leave them out in the Pacific while the remaining 125,000 dwt comes into Puget Sound.

In *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959), the Supreme Court struck down an Illinois statute requiring contour mudguards on tractor-trailers, noting that 45 other states permitted straight mudguards and that tractor-trailers had to be free to move from state to state. The burden of changing mudguards at the Illinois border is *de minimis* compared with the necessity of reconstructing a tanker to comply with the Washington Tanker Law.

### III. THE WASHINGTON TANKER LAW, BY APPLYING STANDARDS AND REQUIREMENTS THAT HAVE NOT BEEN ACCEPTED INTERNATIONALLY, UNCONSTITUTIONALLY INTERFERES WITH THE CONDUCT OF FOREIGN RELATIONS BY THE EXECUTIVE BRANCH.

The United States has been a leader in establishing a legal regime for the high seas based on uniformity. The United States was a major contributor to the 1948 Geneva Conventions on the high seas, the continental shelf, and the territorial sea and contiguous zone, and is currently a party to those treaties (13 U.S.T. 2312, 15 U.S.T. 471, 15 U.S.T. 1606). International negotiations for revised conventions in these areas are currently under way and the United States has been a vigorous supporter of the necessity of legal uniformity in all sectors, including the regulation of maritime commerce and pollution control.

Maritime commerce occurs for the most part on the high seas, outside the territorial jurisdiction of any nation. As a consequence, international standards relating to safety and pollution avoidance are a prerequisite to any meaningful attempt to control oil pollution in the oceans. Through the development of internationally agreed standards each nation is able to impose on vessels that fly its flag or enter its ports regulations that are in harmony with those imposed by other nations and which protect the mutual interest of all maritime nations. The United States has been committed to the development of international agreements, particularly in the area of safety and pollution prevention and control, and has been a vocal advocate of this view in many international conferences and negotiations. This commitment continues to influence the policy decisions of the United States in developing regulations for tanker construction and operation.

Environmental Impact Statement prepared by the Coast Guard, dated August 15, 1975 (hereinafter "EIS", A. 215-224).

A specialized agency of the United Nations, the International Maritime Consultative Organization (IMCO), has, since it began operation in 1959, provided a forum for the development of international agreements relating to vessel construction and operation. These agreements pertain to general safety, e.g. the International Convention for the Safety of Life at Sea, 16 U.S.T. 185, International Convention on Load Lines, 18 U.S.T. 1857, International Regulations for Preventing Collisions at Sea, 16 U.S.T. 794, and expressly to the problem of oil pollution, e.g. the International Convention for the Prevention of Pollution of the Sea by Oil, 12 U.S.T. 2989 as amended at 17 U.S.T. 1523, International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 26 U.S.T. 765, International Convention For Civil Liability for Oil Pollution Damage, 1969, 9 *Int'l Legal Mats.* 45 (1970), International Convention for Prevention of Pollution from Ships, 1973 (known as the 1973 Maritime Pollution Convention), 12 *Int'l Legal Mats.* 1319 (1973), and International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, 11 *Int'l Legal Mats.* 285 (1972).

Many of these agreements are in force as international treaties and have been ratified by the United States. Some of the more recent agreements are currently pending before Congress and are expected to come into force in the future.

The United States has been diligent in working within IMCO to develop a sound system of international rules to promote safety and to reduce oil pollution and to have that system adopted by all major maritime nations. The most recent negotiations in this area produced the 1973 Marine Pollution Convention which establishes very strict limitations on the amount of oil discharge permitted during normal operations and imposes design and construction standards to reduce normal and accidental discharges. On March 22, 1977, President Carter transmitted the 1973 Marine Pollution Convention to the Senate for Advice and Consent. In his transmittal letter, President Carter stated that the convention:

deals comprehensively with operational discharges from vessels, establishes strict controls over oil discharges, and imposes regulations for discharges of other pollutants. It also creates standards for the construction and design of ships which will carry these hazardous cargoes.

I feel that entry into force of this Convention will be an important step in controlling and preventing pollution from vessel discharges. Message from The President of the United States transmitting The International Convention For The Prevention of Pollution From Ships, 13 Weekly Comp. of Pres. Doc. 422 (Mar. 22, 1977).

The Coast Guard, the agency within the United States that has the major responsibility for developing and policing maritime safety and pollution regulations, believes that it is in the interest of the United States to encourage all major maritime states to adhere to the 1973 Marine Pollution Convention (A. 217-221). As reflected in the Coast Guard Environmental Impact Statement, the achievement of that objective requires

good faith cooperation of all nations and in particular the willingness of the United States to accept the compromises that are inherent in any negotiation (A. 215-225, 285).

The Federal Government, and only the Federal Government, is entitled to conduct the foreign affairs of the United States. *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948). As a consequence, any state law that interferes with the foreign affairs authority of the Federal Government must give way under the Supremacy Clause. U.S. Const., Art. VI, Clause 2. *Hines v. Davidowitz*, 312 U.S. 52 (1941). This is true even when there is no Federal legislation or formal treaty governing the situation.

In *Zschernig v. Miller*, 389 U.S. 429 (1967), this Court struck down an Oregon inheritance law on the sole ground that the law involved the state in making judgments concerning the nature of foreign governmental systems and that such actions created a serious possibility of embarrassing the United States in its relations with the foreign nations affected. The court stated:

The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. [Citation omitted.] Where those laws conflict with a treaty, they must bow to the superior federal policy. [Citation omitted.] Yet, even in absence of a treaty, a State's policy may disturb foreign relations. . . . The present Oregon law is not as gross an intrusion in the federal domain as

those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.

The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy. 389 U.S. 429, 440-441 (1967).

Applying these principles, the State of Washington must refrain from taking actions that will interfere with the foreign policy objectives of the United States to obtain international agreement relating to the use of the world's ocean areas and to the construction and operation of tankers. Although the United States may ultimately decide to pursue a unilateral approach to the regulation of oil tanker design and equipment, such a decision will clearly affect United States relations with other maritime countries, and the decision to embark upon that course must be reserved to the Federal Government. Only in that way can the multiple interests of the United States be protected. In the realm of foreign relations the United States must have a single and effective voice. The State of Washington cannot be permitted to enact legislation that interferes with the ability of the United States to participate in international agreements relating to the regulation of oil tankers.

**CONCLUSION**

For reasons given above, Washington's Tanker Law constitutes an impermissible intrusion into an area that has been preempted by the Federal Government, an unconstitutional regulation of foreign and interstate commerce and an unconstitutional interference with the responsibility of the Federal Government for the conduct of foreign relations. Consequently, the judgment of the District Court should be affirmed.

Respectfully submitted,

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